DEMOCRATIC COMMITMENT AND THE NEW ZEALAND OFFICIAL SECRETS ACT: A CONTRADICTION IN TERMS

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ABSTRACT

Information and access to it, is a vital ingredient in the democratic model. Government secrecy however inhibits the flow of information to citizens. This denial of full and accurate information stunts and weakens public debate.

The Official Secrets Act by it's existance and intent, helps to perpetuate official secrecy. It is a vauge Act of illdefined meanings, and grants wide powers of arrest and conviction, powers which can be used at the discretion of a government. It has dangerous potential as a discretionary political weapon, and could be employed to silence or harass critics.

Reform of the Act is a necessary part of any programme designed to reverse the trend to official secrecy and to bring about more open government. However, reform takes time and effort and may not always be successful. It requires either exclusion of the executive from the reform process, or sustained public opinion pressure to force a government or a potential government to reform the secrecy system.

In New Zealand there is a rising expectation that citizens are entitled to know what a government is doing, but it is not at a level that will ensure significant reform of government secrecy and the Official Secrets Act.

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CHAPTER ONE

INTRODUCTION

> In peace and in war, some of the activities of a modern state must be conducted in secret. [1]

So reads the editorial in the New Zealand Herald for 3 November 1951, the occasion being the first reading of the Official Secrets Bill. These sentiments are perhaps accepted as much by the governors and the governed of today as they were during the difficult and disturbed year of 1951.

The statement, however, demonstrates much more. It alludes to the situation where the citizen must trust the government on matters of which it has no knowledge.[2] It declares that secrecy has a place in government, not only during times of security threat, but also during periods of calm. More importantly, it is vague and undefinitive. Of course no-one expects precision about such a subject in the space of an editorial column. However, this absence of explicitness in defining secrecy - what should be kept secret, for how long, for what reasons, by what authority - pervades the whole area of

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[1] New Zealand Herald, Editorial, 3 November 1951, p. 8.

[2] This is highlighted in the case of the recent expulsion of the Soviet Ambassador, Sofinsky, where the Prime Minister kept secret the details of the S.I.S. action and the evidence, saying that the public must "trust the system". The Press, 30 January 1980, p. 1.

information in a democracy.

Few people have clear and explicit ideas about the definition of what should and should not be kept secret. This is perhaps a product of the subject itself, but inevitably those who are lucid about secrecy are contradictory, not only with one another but also with those who are less clear about the security of information.

This clash manifests itself in the disagreement between the traditional side of secrecy, that is the government, and the freedom of information campaigners. At the same time both groups are divided amongst themselves about the correct course of action. This is to be expected where human beings, each one unique with his or her own interests, are discussing a matter of political importance.

The problem is, nevertheless, a tangled and complex one. Not only are the freedom of information advocates multifarious in their views, but the official position, embodied in the law of the land, favours generality instead of precision and detail.

The imprecision is more than a simple problem of comprehension. The fact that an important concept such as secrecy is left ambiguous means it is open to interpretation, and interpretation means inconsistency. This point is important and will be discussed in due course, when the New Zealand Official Secrets Act is considered.

This Act can be seen as a manifestation or a product of the practice of official secrecy. As such, it is a symbol of the whole system, an obvious target in the

debate on information and secrecy. It has become the centre-piece in the battle for freedom of information.

The fact that there is pressure for reform is recognition that there is a problem, an anomaly, that part of the system is no longer necessary or desirable. In this respect, nearly every individual or group that supports reform, sees official secrecy as undemocratic, and the Act as epitomising the depreciation of democracy.

This situation provides the study with a focus and a definition of the problem.

> Why is the Official Secrets Act regarded as undemocratic, and what attempts are being made to change the situation?

If this question is answered initially in a hypothetical manner, by making certain suggestions as to the possible state of affairs and then testing these suggestions against the practice, the conclusions drawn will enable a clearer understanding of the problem.

The propositions of this thesis are:

1. That democratic theory regards information as important in a political system.
2. That official secrecy is in some senses contradictory to this theory.
3. That the Official Secrets Act, by its existence and its operation, is undemocratic.
4. That reform is necessary to reconcile practice with democratic theory.
5. That because the Act is undemocratic, and there is pressure for change, reform will occur.

These propositions suggest an explicit pattern of research. Firstly, a discussion of democratic theory and the democratic model in New Zealand and the importance of information. Secondly, a description and analysis of the practice of official secrecy in general, the reasons and excuses for it, and whether the reality may or may not be contradictory to the theory. Thirdly, a detailed descriptive analysis of the Official Secrets Act, how it came into being, what it does, how it has been used, and what its implications are for democracy. Fourthly, an account of the process of reform, initially in other countries and then concentrating on the New Zealand situation, looking at past attempts and present efforts. Fifthly, by evaluating the status of the Act and the moves for change, to offer some conclusions about how reform will occur, and to what extent.

The first task is, then, information and democratic theory.

DEMOCRATIC THEORY, SECRECY AND THE FREEDOM OF INFORMATION

Democratic conventions and ideals, while remaining amorphous and largely unexplored in the minds of most citizens, still constitute the basis of our society. The fact that these conventions and ideals remain vague and shapeless can be partially attributed to the situation where there is no democratic theory, only theories.[1]

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[1] Robert Dahl, A Preface to Democratic Theory (Chicago : The University of Chicago Press, 1956), p. 1.

Thus when a concise definition of 'democratic theory' becomes necessary to the understanding of particular political institutions and phenomena of a given society, the task is indeed immense.

Nevertheless, a central core runs through these theories: that government should be conducted in the interests of all the people, and that it should be limited and controlled by the people.[1] These concepts are originally based in the deep mistrust of governments. As Jefferson noted,

> Sometimes, it is said that man cannot be trusted with the government of Himself. Can he then be trusted with the government of others? [2]

This being the case, there are many methods, depending on the political system, that the citizens of a society employ to carry out the important task of limitation and control.

In New Zealand these controls, as outlined by Dicey, are two-fold. Firstly, the control of government by Parliament and secondly, the control of Parliament by the electorate.[3] It is almost trite political science to suggest that these controls no longer operate in the way Dicey envisaged, if they ever did. The exercise, however is not to discuss the operation of the democratic method in New Zealand as such, but to isolate and describe the

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[1]Keith Ovenden, "Reaffirming the Anglo-American Democratic Ideal," in Improving New Zealand's Democracy, J. Stephen Hoadley, ed. (Auckland : New Zealand Foundation for Peace Stduies, 1979), p. 18.

[2]Thomas Jefferson, quoted in O. John Rogge, "The Right to Know," The American Scholar, Vol. 41 (1972), p. 643.

[3]David Baragwanath, "Reducing Secrecy in Government," in Hoadley, op cit., p. 59.

importance of information in the practice of this method.

Thus the question is posed: are the secretive practices of a government contradictory to the ideals of democratic theory? Even a cursory glance at democratic literature tells us that the answer must be "yes". To justify this answer one must turn to the three sentinels of limitation and control: representative government; the Rule of Law; and public opinion.[1] In each case the free flow of information is seen in theory to be vital to one degree or another in the upholding of democratic ideals.

REPRESENTATION

The reality of representative government has, in modern society, replaced the old and now redundant ideal of direct democracy. Full, open and frank discussion about the issues of the day are seen as important elements in the election of these representatives.

Information, however, can be seen as generally superfluous to the actual casting of a vote. Although some argue to the contrary, suggesting that the elector must have facts in order to exercise sound judgement on the conduct and merits of the candidates and thus cast an intelligent and rational vote,[2] many are more sceptical. Joseph Schumpeter claims, in fact, that information is plentiful and readily available (writing in the United States in 1942) but that the vast majority of citizens

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[1] Ovenden, op cit., pp. 18-22.

[2] Enid Campbell, "Public Access to Government Documents, Australian Law Journal, Vol. 41, 31 July 1967, p. 74.

are not trained in the digestion and application of knowledge. Therefore, he suggests, ignorance will persist in the face of masses of information and that irrationality will remain a feature of the political system.[1]

Alternatively, even if an elector did have the capacity to analyse the information he received, the large amount of time and effort needed for that analysis, so as to cast a sensible vote, would simply be a waste of resources. This, for the simple reason that in the mass electorates of today his vote is unlikely to be important in the outcome.[2]

There is the possibility, however, that where an elected representative has acted in an improper or illegal manner, official secrecy may protect him or her, and thus prevent the public from discovering that this person was unfit to govern. Certainly this type of secret shroud was used to protect Richard Nixon and helped him to stay in office, more than two years after the Watergate scandal broke. Therefore, freedom of information may not be so crucial in the normal selection of representatives, but it may be vital in the dismissal of unsuitable or unscrupulous office holders.

THE RULE OF LAW

A second bulwark against tyranny in a democracy is the rule of law, the central theme being that government

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[1] Joseph A. Schumpeter, Capitalism, Socialism and Democracy Fourth Edition (New York : Harper Brothers, 1942), p. 261.

[2] Brian Barry, Political Argument (London : Routledge and Kegan Paul, 1965), p. 270.

institutions should be constructed in such a way so as to require governments to control themselves. This is done either through a system of checks and balances or by a constitution, or both.[1] However, with the rapid economic, social and political development since the nineteenth century, a complex and difficult problem has arisen, hampering the implementation of these controls. That is reconciling efficient executive government with the desire for democratic control.[2] In a political and economic system needing rapid and efficient decision-making, the slower more deliberate method of deciding courses of action, as practiced by representative assemblies, is often by-passed and supplanted by an increasingly powerful executive.

This is a major problem, threatening the continued practice of the democratic method. The threat is perhaps more pronounced in New Zealand than elsewhere. Even in theory, no meaningful system (such as in the United States) of checks and balances exists. Dicey's two-fold theory of democratic control, as outlined above, is perhaps the nearest we come to checks on the executive. However, the growth of complex societal and economic systems, coupled with strong party discipline and the lack of public knowledge, has to a large degree rendered this theory redundant.

At the same time the rule of law not only invovles checks and balances but also implies an assurance on

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[1] Ovenden, op cit., pp. 19-20.

[2] David Williams, Not in the Public Interest : The Problem of Security in a Democracy (London : Hutchinson, 1965), p. 9.

behalf of the state that the citizen has equal access to legal recourse before the courts, and that these courts should be free from political intervention. Although the New Zealand system could not be described as perfect, no-one would suggest that these conditions do not exist in this country. However, in the case of information and secrecy, it can be asserted that the rule of law does not always operate in the favour of the citizen. Under the Official Secrets Act, for instance, the requirement that a defendant be innocent until proven guilty has, in effect, been reversed.[1] Also, the decision to prosecute under this Act is left to the discretion of the Attorney-General, a politician.

To take these two anomalies at face value then, the rule of law as envisaged in democratic theory, would seem to have been usurped in the face of government secrecy. These points will be explored later, in Chapter Four, but it is worth noting at this point as the ideals of the democratic model are examined, where the practice is likely to deviate from the theory.

The maintenance of the rule of law is seen to be

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[1] Official Secrets Act 1951, section 7. "On prosecution under this Act, if, from the circumstances of the case, or the conduct of the accused person, or his known character as proved, it appears that his purpose was ... prejudicial to the safety or interests of the state, it shall be deemed that his purpose was such a purpose, unless the contrary is proved ... if any sketch ... or information relating ... to a prohibited place or any secret password is collected ... or communicated (without authorization) it shall be deemed to have been collected ... or communicated for a purpose prejudicial to the safety or interests of the state, unless the contrary is proved."

dependent on two factors, particularly in New Zealand's case, where few truly formal checks exist to ensure the liberty of the citizen. One is ensuring that the mechanics of legal redress are independent of politicians, and the other, that the conduct of government should receive the undivided attention of the people.[1]

If the former is only partially fulfilled (as perhaps in the case of government secrecy) then the role of the latter becomes that much more important. It involves not simply the silent observation of government, but meticulous scrutiny, culminating in the expressive pressure of public opinion. Herein lies the third sentinel of limitation and control.

INFORMATION AND PUBLIC OPINION

Despite the charges in recent years, that government is taking less notice of public needs and wishes, public opinion can be seen as a very real sanction on the power of the government.[2] This sanction achieves a high measure of control in several distinct ways, each in part dependent on the availability of information about government activities for its effectiveness.

In the first instance, governments depend on the consent of the people to remain in office. That is, if they constantly offend the people they will lose office at an election. As Enid Campbell notes, certain conditions

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[1] Ovenden, op cit., p. 21.

[2] Keith Jackson, New Zealand : Politics of Change (Wellington : A.H. & A.W. Reed, 1973), p. 153.

need to apply for this mechanism to function properly:

> It is common ground that in a society which professes to be democratic, citizens ought to be informed about what their government is doing. Citizens have a right to decide by whom and by what rules they shall be governed, and are entitled to call on those who govern on their behalf to account for their conduct. [1]

If a government loses consent when it is called to account, then the country becomes ungovernable by that administration. Information, however, is seen as increasingly necessary in the act of consent. It has been noted that increased secrecy can be a corrosive, alienating force in our society.[2] If this is the case, then public consent is in danger of being undermined.

Alternatively, however, it could be said that the government can cultivate public opinion in its favour, by withholding or suppressing sensitive information, or timing its release in such a way as to render it harmless.

The threat of loss of office through offending public opinion is, however, only an indirect method of influencing government policy formulation and decision-making. It is by nature a reaction to government after the decisions have been taken. Note also that governments generally lose office when they continually offend the public. The electoral weapon then, is rather a blunt instrument and is unselective when it votes out a government. Good policies along with the bad are rejected.

Two more positive alternatives to electoral weapons

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[1] Campbell, op cit., p. 74.

[2] Hugo Young, The Crossman Affair (London : Hamish Hamilton Ltd., with Jonathan Cape and the Sunday Times, 1976), p. 115.

are the participation and involvement of the public in the decision-making procedure thus enhancing good government; and giving prior knowledge of intended government actions which helps ensure efficiency.

Despite the government commanding the services of many of the best minds in the country, numerous advisory bodies and a large well-educated bureaucracy, government actions are not, for various reasons, always exclusively in the public interest. To ensure that they are, the theorists suggest that the public must be involved in policy development and decision-making so as to ensure that many different ideas and all sides of the argument can be heard. As Mill pointed out:

> Mankind ought to have a rational assurance that all objections have been satisfactorily answered; and how are they to be answered if that which requires to be answered is not spoken ... difficulties should be freely stated. 1

More recent theorists have restated the importance of the role of public participation in the conduct of good government and the essential part information plays in that role,

> It is characteristic of democratic government not only that the rulers should try and pursue the good of the community as a whole, but that they should be ready generally to share their reasoning with the community as a whole. 2

> We need all the objections to a course of action to be canvassed in advance in order to avoid embarking on it unadvisedly. 3

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[1] John Stuart Mill, Three Essays: On Liberty; Representative Government; The Subjection of Women, with an introduction by Richard Wollheim (Oxford University Press, 1972), p. 48.

[2] J.R. Lucas, Democracy and Participation (Penguin Books Ltd., 1976), p. 83.

[3] Ibid, p. 43.

The corollary of these statements is that secret decisions and advice are basically anti-democratic, in that they deny the citizen the right to any meaningful measure of participation in the affairs of government. By denying the public access to information about government's intended actions the government itself cannot know the true state of public opinion on the issue, because the public will not not know that there is an issue. "To know that one has a secret is to know half the secret itself."[1]

The ideal, perhaps, is outlined by Walter Lippman,

> If the country is to be governed with the consent of the governed, then the governed must arrive at opinions about what their governors want them to consent to. [2]

In this ideal, opinion and action are as closely allied as possible, thus avoiding unnecessary waste through inefficiency.[3] That true democracy is the most efficient form of government is a view held by many, and thus it is a central concept in the democratic ideal,

> To command the support of the people it is essential that the processes of decision-making should be as open as possible. This is a vital characteristic of any democracy ... The greater the secrecy the greater the sense of exclusion from the decision-making process and the greater the difficulty of gaining public acceptance for the decisions arrived at - and very probably too, the worse the decisions. [4]

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[1] Henry Ward Beecher, in The International Thesaurus of Quotations, compiled by Rhoda Thomas Tripp (Penguin Books, 1976), para. 849.

[2] Walter Lippman, quoted in O. John Rogge, op cit., p.643

[3] Ovenden, op cit., p. 21.

[4] Memorandum of Dissent by Lord Crowther-Hunt and Professor Peacock in the Kilbrandon Report, Commission on the Constitution, Chapter 11, para. 136; footnoted in Joseph Jacob, "Some Reflections on Government Secrecy," Public Law, 1974, p. 27. (Emphasis added).

We return to the idea of trust. To command the support of the people, the people must trust the government. This trust, however, does not come easily, as one of the main reasons behind the desire for limitation on governments is the belief that they are inherently untrustworthy. Limitation in this case stems from the dissemination of information allowing uninhibited, wide open debate.[1]

If in order to guard against tyranny and corruption, a citizen asks "Why are you doing that?"[2] and is denied part or all of the answer, then the trust that a citizen has for the government begins to break down. The denial of the information can itself be seen as a function of lack of trust, this time on behalf of the government, whose attitude may often be that the public cannot be trusted to react wisely if allowed access to all the information about an issue.[3] That is, the leaders do not trust the people to decide for themselves what is best for them.[4]

The individual's right to pursue his own interests and ambitions is denied by official secrecy, a denial, not in order to prevent harm to others (as Mill suggested was the only reason for infringing rights)[5] but because in the minds of the leaders, the individual's own physical

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[1]Justice Black, quoted in O. John Rogge, op cit., p. 648.

[2]Lucas, op cit., p. 84.

[3]Freedom of Information and Open Government. The report of a study group of the Hutt Valley Branch of the New Zealand Federation of University Women (Inc.). Ed. Myra Harpham, 1978, p. 76.

[4]Rogge, op cit., p. 15.

[5]Mill, op cit., p. 15.

and/or moral well being is in danger. This encroachment on the individual's freedom of access to information is, as Mill sees it,

> ... The undertaking to decide that question for others without allowing them to hear what can be said on the contrary side, [1]

and is therefore patently anti-democratic.

This argument could be countered by pointing out that not only is full public participation physically impossible in today's world, but that if it were possible, very few people would bother to participate anyway. Only a small number of interested citizens are actively involved in political activity and debate, and this could be pointed to as evidence that the people are largely satisfied with the status quo. In spite of this lack of democratic activity by citizens, it is suggested that the extent to which the dissenters and activists are tolerated, is the truer measure of democratic commitment.[2] In this respect, governments point to the level of open and free debate as evidence of the upholding of the democratic ideal, but neglect the fact that this debate, through secrecy, may be ill-informed and therefore superficial and irrelevant.

Some bureaucrats would argue that the public interest is best served by a cloak of confidentiality, while democrats would argue the opposite, saying that the denial of information is a virtual suppression of radical or

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[1] Mill, op cit., p. 31.

[2] Ovenden, op cit., p. 22

deviant views. In turn this stifling of the radical leads to a weakening in the wider public debate as the stimuli presented by the deviant views has been removed.[1] As Mill points out,

> ... The peculiar evil of silencing the expression of an opinion is that of robbing the human race: Posterity as well as the existing generation: Those who dissent from the opinion still more than those who hold it. If the opinion is right they are deprived of the opportunity of exchanging error for truth; if wrong they lose what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error. 2

Even further, he suggests that

> Deviant human thought stifled in the past by torture, killings, etc. and now by legal constraints, never blaze into prominence ... this pacification is the sacrifice of the entire moral courage of the human mind. 3

With this stifling (by various means, suppression of information being one) of opinions unsympathetic to the status quo, and thus blunting vigorous public debate, the status quo itself is in danger,

> However true an opinion may be, if it is not fully, frequently and fearlessly discussed, it will be a dead dogma, not a living truth. 4

Ultimately then, the democratic model becomes badly eroded by the denial of information. Public participation is effectively abrogated; trust breaks down between the governed and the governors; public debate becomes stunted; public opinion as a central element in the the democratic ideal is undermined. This all in turn may

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[1] Ovenden, op cit.

[2] Mill, op cit., p. 20.

[3] Ibid., pp. 38-42.

[4] Ibid., p. 44.

lead to the disaffection of many sections of society, particularly if a change of government (the final sanction of public opinion) brings little or no meaningful change to the established political scene.

Through suppression, political activists may become increasingly disruptive and subversive, thereby creating social instability. The apathetic disinterested majority may also become disaffected from government policies as the gap widens (through lack of communication) between opinion and action. They in turn may become hostile or disruptive, thus further increasing instability.

Candour, then, an attribute so highly valued by bureaucrats and government members, that secrecy must be maintained to insure its continuance within the circles of power, will become increasingly muted in the area where it matters most in a democracy, in the dialogue between the government and the public.

The picture may be apocalyptic and it is certainly the case that the importance of information in a democracy can be over-emphasized. However, if one compares the ideal to the reality and follows the possible pattern of deterioration of this ideal, then it serves to highlight the possible consequences of official secrecy. That is, if the secretive practices of a government continue to infest the democratic model, then that infection will lead to disease and the disease possibly to death.

The suppression of information can be seen of course as only one of the ailments that can affect the body politic in a democracy. However, the central theme

of democracy, freedom in deciding who should govern and justice in the conduct of government,[1] are greatly infringed upon by secrecy.

Modern theorists go further than simply discussing the maintenance of freedom and justice however, by suggesting that a general opening up of the political culture is vital to the development of a better democratic society:

> Whereas the central institutions of the expanding society were economic, those of the improving society are political, that is, public, general and open. [2]

C.B. MacPherson also suggests that:

> The concept of a man's essence is not in the maximization of his utilities, but maximization of his human powers ... man is an infinite developer of his human attributes. [3]

Freedom of information is seen by many as an integral element in this pursuit of the "improving society".

It stands to reason, therefore, that a government's denial of public access to information about its activities, not only usurps the democratic rights of the individual, it also impedes the efficiency and justice of government which in the long run renders the fuller development of man's attributes impossible.

If it can be concluded then, through considering the theory, and measuring this against the practice, that reform is necessary, how does a democratic society go

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[1] Lucas, op cit., p. 110.

[2] Ralph Dahrendorf, The New Liberty: Survival and Justice in a Changing World (London : Routledge and Kegan Paul, 1975), p. 81.

[3] C.B. MacPherson, Democratic Theory: Essays in Retrieval (London : Oxford University Press, 1973), p. 32.

about such a task?

A full answer to this question would be beyond the scope of this thesis. What this study will attempt to show is how our society might go about it.

There are, firstly, several points that can be raised about such a process of reform. It would seem to occur first when a flaw or anomaly arises within the system. That is, it is no longer operating as it should do. This flaw, however, can be seen in an entirely different manner depending on the stand point of the observer. The call for reform can come from many sectors, while others may oppose such a change. Of course, the number and type of those who become interested in reform will depend on where in the system the changes are mooted and who they will affect.

Theorists will see reality failing to emulate the ideal. Pressure groups may see the flaw infringing on their area of interest. The public service may be unsympathetic as reform may make their job more difficult. Government may be forced to take an interest in the problem because of the pressure from groups or from within its own ranks. The Opposition may use the promise of reform as a device to provide electoral support. The public at large may not be aware of a problem if it does not affect their daily lives.

Each group, therefore, depending on the area and level of interest, will espouse its own proposals for reform. The proposals, however, will invariably clash, while a solution to the problem needs to be sought in such

a way so as to satisfy most people without infringing on the rights of others. This conflict resolution remains in part the task of the government, since it is their responsibility to provide good government for all. Reform is a method of improving and enhancing this good government.

This process, however, of aggregation and articulation of interests, resulting in an appropriate government response, is based on one assumption: that our society is democratic. We must ask the question then; does our political system follow the principles of democracy? The immediate answer by most citizens would be an emphatic "yes". Elections are contested freely, basic freedoms of the press, assembly and speech are proclaimed, the citizen is assured of equity before the law and so on. Of course, the real and imperfect world can never live up to the ideal we ascribe to. Nevertheless, most people would probably consider our system to be a reasonable facsimile of the democratic model. Is this in fact so?

Many critics of the system consider our system far from what it should be. Much of the critique is aimed at what is seen as the over-extensive and dominant power of the executive and the consequent decline in the importance of Parliament. Debate within the House has been described as at "gutter-level", while the public at large are more and more excluded from the complex and sometimes unfathomable activities of government.

One explanation for this apparent decline in democratic standards is the pressure of modern society (infla-

tion, urbanization, overpopulation, etc.) that is threatening the existence of Liberal-democratic states.[1] As an alternative explanation, or perhaps as a result of these pressures, the decline of democratic ideals can be attributed to a general lack of commitment to these ideals.

Thus we must ask another question: do our leaders and we ourselves sufficiently learn the true nature of these beliefs before we put them into practice?[2] If the answer to this question is "no", then the prospects of real reform occurring, in our case in the area of the Official Secrets Act, are bleak.

This conclusion is drawn if we return to the central core of this chapter - are secretive practices of government incompatible with the democratic ideal? If the governors have not truly learnt the meaning of democratic beliefs and are therefore unsympathetic or unfamiliar with the ideal, then the chances that they will consider official secrecy incompatible with democracy are small. In turn, the likelihood of reforming secretive practices to make the government more democratic is correspondingly small. That is, if our governors do not know what is truly democratic, how can they know what is undemocratic?

If we follow this hypothetical situation, noting that reform will either not occur or if it does, only in a superficial, shallow way, then the only way that real change can come about is through pressure from public

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[1] Dahrendorf, op cit., p. 10.

[2] Keith Ovenden, "Does a Democracy Need Secrecy?" The Week, 1976, August 13.

opinion. This will manifest itself either by dismissing the government and electing another that will institute reform or by direct pressure on the government of the day.

The possibility of the former strategy being successful hinges on two factors. One, that the public are sufficiently incensed to dismiss the government and two, that there is an alternative. The latter is also dependent on two factors, one, that the public are sufficiently informed so as to be aware of the problem and be able to argue their case coherently and logically. (Of course, secrecy itself can hamper and stifle the debate over the reform of secrecy.) Secondly, the public, like the leaders, must be adequately endowed with democratic beliefs so that they will be able to draw attention to flaws in the practice of the democratic ideal.

In this way information and democratic beliefs are vital, not only to a coherent and lively debate, but also to the actual initiation of the debate about reforming the debate itself.

The questions raised in this argument and the hypothetical situation developed in answering these questions will be explored further in an examination of the attempts to reform the New Zealand Official Secrets Act (Chapter Six) and in the conclusions drawn about the Act itself (Chapter Seven).

The important fact at this point is that the suggestion made by proposition one ' "That democratic theory regards information as important in a political system" - is largely borne out by our discussion of its place in

the theory itself. At the same time it has shown that secrecy is undemocratic.

The task of Chapter Two is to examine the reasons and justifications for the practice of official secrecy. In this way both sides of the situation can be studied, which will enable some conclusions to be drawn as to the acceptability of these justifications with regard to the theory. Therefore the democratic commitment, or otherwise, can be measured, by highlighting the present practice against the ideals of the democratic model.

CHAPTER TWO

OFFICIAL SECRECY IN NEW ZEALAND

> I believe ... that in principle secrecy is not a habit or a fact which should be cultivated by a government agency and that it should exist only to the extent it is necessary for the proper fulfillment of its functions.
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> - Sir Guy Powles.[1]

The second proposition offered in the previous chapter was, that official secrecy was contradictory to democratic theory. The statement by Sir Guy Powles argues that this proposition is simplistic and unrelated to real events. Some secrecy is required. It is a necessary evil, that can be useful in the execution of the affairs of government. The practice, however, should not be followed to excess, with the government exercising discretion and caution as to its extent. There would appear to be then some, if not as many, justifications for secrecy as democratic theory has sanctions against.

Are these justifications acceptable in practice? To what areas of information do they extend? How important are unofficial reasons for maintaining secrecy?

All these factors combine to pose the major question that this chapter attempts to answer. Why? Why does official secrecy exist, what is it and how is it explained?

The underlying causes of official secrecy in New

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[1] The Security Intelligence Service Report, by Chief Ombudsman, Sir Guy Powles, 1976.

Zealand are rooted deeply in the constitutional structure of the government. In fact, the so-called "Westminster" (Cabinet) style of government in this country, traditionally sees secrecy as an integral part of the system, just as it is an integral part of everyday human existence.

In more simple terms, the style or accepted method of government, just as the life style an individual, assumes certain practices and procedures, because it is expedient for them to do so. In the case of the government the modus operandi will persist because it is, as they see it, the best way to go about their business.

However, whatever is good for the government, may not necessarily be good for the people. Their interests do not always coincide. Changes will only occur when the status quo ceases to meet the government's needs or where there is pressure for reform from groups outside government. The Westminster style of government then is a method that has, in the view of successive governments, ably suited their own purposes.

Thus in turn, secrecy is a practice that has worked, and continues to work to the advantage of the government. The release of information is the sole preserve of the government. Benefits must out-weigh consequences of information is to be released, because in the absence of public pressure for information there is no rule to induce release. Any dispensing of information is subject first, to the constitutional constraints, and secondly, to the nature and content of that information.

The two doctrines that are central to the constitutional model are collective and ministerial responsibility, and secrecy is an integral and important element in both of them. The other criteria governing confidentiality depend on the content of the information, such as personal and private data, scientific and national security information, law enforcement information and business and financial information, when premature release would prejudice the interests of the state.

However what is meant by this frequently used phrase, "interests of the state"? The need for law arises in society because conflict occurs between individual interests.[1] Rather than the state being the source of law, it is the law.[2] It is then in the interests of society and the public at large that the law remains, as embodied in the state, the one and only original, legitimate authority in that society.[3]

However, can the state have interests as such? If an individual breaks the law, this cannot be seen as contrary to the "interests of the state", or law, as the law has no interests, only purposes. Nevertheless, by breaking the law the individual may harm the state and thus endanger the public interest.

It seems, therefore, that the state and the public

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[1]James M. Buchanan, The Limits of Liberty: Between Anarchy and Leviathan (Chicago: University of Chicago Press, 1975), p. 12.

[2]S.I. Benn and R.S. Peters, The Principles of Political Thought: Social Foundations of Democratic States (New York: George Allen and Unwin Ltd., 1959), p. 308.

[3]Ibid., p. 306.

interest have a common linkage to law. The former being the expression of general intent (need for law) which is above interest groups and beyond political parties,[1] while it is in the interests of the public to accept the authority of the state because it allows them to protect the individual's right to do certain things.[2]

Therefore, the "interests of the state" could be described as legal fiction. It derives legality by virtue of it exercising the sole authority of law, and is fictitious because the law cannot have interests in the conventional sense.

Although the two are linked it is perhaps more correct to talk of "acting contrary to the public interest" rather than the state's. The public interest, however, may change as different interests struggle for power.[3] This struggle may involve a challenge to the validity of some laws. This is not in defiance of the state but expression of a disagreement with the legal order as defined by the interest holding power. Thus the content of the legal order may change.

The state, however, remains as the basis of authority for the enforcement of these changing laws. It, as a legal phenomenon,[4] does not change (unless, of course, it is forcibly overthrown), only the content of the legal

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[1]Hans Kelson, General Theory of Law and State, (translated by Ander Wedburg) (Cambridge, Massachusetts: Harvard University Press, 1949), p. 438.

[2]Buchanan, p. 12.

[3]Kelson, p. 438.

[4]Ibid., p. 181.

order changes.

The legal order at present sees information such as national security and personal data as areas in need of protection by the law. By releasing such information an individual, in the view of the temporary legal order, damages the state and therefore prejudices the public interest.

Thus there is general agreement at present as to which areas should be protected by the state. These areas will be discussed in greater detail later in the chapter, but at present the first task is to discuss the constitutional factors and how they affect, or are seen to affect, official secrecy.

COLLECTIVE RESPONSIBILITY AND SECRECY OF CABINET

The link between the doctrine of collective responsibility and secrecy is a strong one.

> Cabinet meetings are secret, only in this way can completely frank discussion take place between Ministers within Cabinet and without risk of extraneous pressure. [1]

Further, it is argued that:

> The whole basis of parliamentary government would be undermined if Cabinet could not consider various proposals that come before it in the certain and secure knowledge that those proposals were made in complete candour and were for the eyes of that body alone. [2]

The Cabinet maintains this secrecy because in theory all major issues should be discussed freely and without fear,

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[1] Sir John Hunt, Cabinet Secretary, United Kingdom, 1976. Quoted in Hugo Young, op cit., p. 14.

[2] Martin Finlay, quoted in "The Official Secrets Act 1951 and the Unauthorised Disclosure of Information," by J.J. Wardell, Auckland University Law Review, 3, 1 (September 1976), p. 40.

and that members should then accept the decision of the majority and keep quiet or resign.[1] All Ministers must stand or fall together in Parliament, if government is to be carried out in unity, and thus Cabinet must preserve a united front.[2]

Many individuals or groups, such as the Franks Committee[3] and the current Minister of Justice, Jim McLay[4], have reiterated this point strongly, and the depth of feeling for this principle can be seen in official reaction to any threat to the doctrine.

In May 1974, a University Lecturer, Dr. O Sutherland, had his house searched under the Official Secrets Act, concerning the leak of a relatively minor Cabinet paper.[5] The action was taken under a section to be used in "cases of great emergency". Although no-one was prosecuted in connection with the incident, it does demonstrate the importance attached to Cabinet confidentiality where everything remains secret, except for occasional ministerial leaks and brief press statements about policy decisions. This importance was re-emphasised when the then Attorney-General, Martin Finlay, said of the Sutherland affair:

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[1]Marilyn Waring, "Revitalisation of Cabinet, Parliament and Parties," in Hoadley, op cit., p. 44.

[2]E.C.S. Wade and G.G. Phillips, Constitutional Law, Sixth Edition (London: Longman & Co., 1960).

[3]The "Franks Committee" was set up in the United Kingdom in 1972, to investigate the workings of Section 2 of the Official Secrets Act.

[4]The Capital Letter, Vol. 2, No. 36 (68), 18 September 1979, p. 1.

[5]The Press, 27 May 1974.

> It is well known and universally accepted that papers of this kind bear the stamp of extreme confidentiality and go to the very root of Cabinet government. 1

Similarly, in August 1979, the leak of a Cabinet paper (concerned with electricity supply and the environment) prompted a police investigation.[2] Once again nothing came of the inquiry, but the government claimed it had acted as a "matter of principle" over a possible breach of confidence, and not because the document endangered national security or could be prejudicial to the public interest.

In 1976, Keith Ovenden was interviewed at length by two senior police officers (one an Assistant Commissioner of Police) in connection with an article that had appeared in the paper, The Week, of which he was then the contributing editor. The article was about the Powles Report in the S.I.S. which, at that time, had not been published, and referred to an "Annexe" to the report on the case of Dr. Sutch. The police officers said they had instructions to try to ascertain whether a leak of secret material had occurred. Dr Ovenden told them that he did not know who had written the article, and that no-one who then worked on the newspaper would be able to tell them who had. To the best of his knowledge the matter was not pursued any further.[3]

This doctrine of collective responsibility, however, has in recent years come in for criticism, not only

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[1] Finlay, in Wardell, op cit., p. 40.

[2] The Press, Friday, 3 August 1979.

[3] Letter to the author from Dr Ovenden, 18 February 1980.

from reform minded citizens, but also from within the establishment itself. Essentially the critics claim that the secret, collective form of decision-making is undemocratic.

The executive holds the balance of information and therefore the balance of power.[1] The Cabinet becomes a closed shop, out of reach of Parliament (the majority party generally controlled by the executive through party discipline) and estranged from the public at large. Not only has the scope and sphere of action greatly enlarged the power of the executive, but by holding information in confidence, the Cabinet is concentrating power even further.[2]

This often startling rise in the power of the executive helped to prompt an ex-British Cabinet Minister, Richard Crossman, to attempt to "light up the secret places"[3] in British politics by publishing his comprehensive diaries on the activities of the Labour Cabinet of 1964-70. Although he died before this was possible, a condensed version of these diaries appeared in The Sunday Times. The government, represented by the Cabinet Secretary, Sir John Hunt, failed to halt these articles, but tried again when the executors of Crossman's estate moved to release fuller versions of the diaries. Crossman did not leave "diaries" as such, but long and often tedious tape recordings, from which Janet Morgan prepared a three

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[1]Jacob, op cit., p. 32.

[2]Waring, op cit., p. 44.

[3]Young, op cit., introduction.

volume edition.[1] The pieces The Sunday Times published were edited excerpts from this version.

The attempt, by court injunction, to stop these volumes being published failed with the judgement being hailed as a virtual rejection of Cabinet secrecy, and a challenge to the reasoning behind it.[2]

Despite this apparent rebuff to the doctrine of collective responsibility and the current practice, in Britain at least, of extracting an agreement to differ when a Minister deeply disagrees with colleagues, rather than resigning,[3] the theory still remains intact and a cogent argument for official secrecy.

Once again we return to the point that, in general, if a procedure suits a government and so long as pressure for change is non-existent or feeble and fragmented, it will usually persist. Collective responsibility then, with its attendant secrecy, remains an entrenched and important facet of Westminster systems, including the New Zealand version. It affects, however, only the papers that are deliberated on in Cabinet. The greatest depository of information is in the government departments who, of course, not only administer, but also investigate, research and advise on policy matters. We turn, therefore, to the second basic concept of Westminster government, Ministerial responsibility.

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[1]Richard Crossman, The Diaries of a Cabinet Minister (London : Hamish Hamilton/Cape), 3 Volumes, 1975-77.

[2]Young, op cit., p. 198.

[3]"The Government Sieve," The Economist, Vol. 259, 26 June 1976, p. 7.

SECRECY, THE PUBLIC SERVICE AND MINISTERIAL RESPONSIBILITY

The subject of ministerial responsibility is a confusing and difficult one, in theory, practice and interpretation. It is beyond the scope and capacity of this thesis to provide a full explanation and defintion of the doctrine. However, the subject is an important one in any discussion on secrecy. In one way or another, the concept of individual ministerial responsibility has entered into the debate about secrecy and reform. Does it belong there?

One way of looking at the doctrine is in a strictly legal sense. That holders of office under the Crown are personally liable for their acts. Moreover, as the Crown can do no wrong, every act of the Crown must be done through a Minister who can be held responsible. They are responsible for acts which they commit or sanction in their individual capacity,[1] perhaps just as any private citizen is.

There is, however, another way of approaching the problem. Rather than seeing the Minister legally responsible (which, of course he still remains) the view is that by convention, the Minister is, depending on the circumstances, collectively or individually responsible for his own actions or those of his department, to Parliament.

If decisions are made by Cabinet they are automatically endorsed by collective responsibility. However,

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[1]Wade and Phillips, op cit., p. 80.

when a Minister makes a decision without consulting Cabinet (which is normal practice with regard to matters of lesser importance), the Minister must rely on the support of Cabinet colleagues if political criticism becomes vocal.[1] That is, the Cabinet invokes collective responsibility to protect one of its members, which means making each Minister responsible for the conduct of every other Minister and his department.

Only when Cabinet withdraws its support is the Minister in real danger of becoming a victim of a no confidence vote. This rarely occurs, however, as such a vote could be seen as a warning that the legislative branch may not co-operate with the government. As this would not only be an embarrassing loss of face, but would also show signs of weakness and division, Cabinet will support the individual Minister invoking collective responsibility, and thus use their majority to ensure the failure of any no confidence vote.[2]

The individual Minister, then, is made responsible firstly to Cabinet, and then the Cabinet is rendered responsible to Parliament. In one way or another this responsibility has been used as an argument for keeping the public service shrouded in secrecy. It is argued that the relationship between the civil servant and the Minister must remain private so as to ensure the public servant appears apolitical and non-partisan. However,

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[1]Wade and Phillips, op cit., p. 80.

[2]K.J. Scott, The New Zealand Constitution (Oxford University Press, 1962), p. 119.

the civil servant cannot be blamed by Parliament for advice he has given as the Minister must take the responsibility himself. The link then between the doctrine of responsibility thus seems rather tenuous. If a Minister takes full responsibility for his actions and the activities of his department, it stands to reason that the question of whether the advice and information given by the servant should be open or secret, is irrelevant. He/she cannot be held responsible in the constitutional sense by Parliament or the people. Also, although the servant may take policy decisions, these are, or should be, endorsed by the Minister.

Therefore advice, views and opinions held by public servants do not need to be protected in order to preserve anonymity. It is a meaningless concept as the Minister takes the responsibility. Perhaps he may not be able to know all that goes on, but he should be aware of a great deal, if not all the activities and process, then at least the aims and interests.

Thus, although there is some argument for keeping these relationships between Ministers and civil servants confidential, so as to ensure frank interchange of ideas, the argument for administrative secrecy is in many ways separate from ministerial responsibility.

The ideal of free, frank and private discussion is a notion that appeals not only to Cabinet Members, but also to the administrative arm of executive government, the public service. The traditional argument within the public service is that secrecy must remain a part of their

practice.

> Otherwise it would be impossible for confidential intercourse to be maintained and the administration of public affairs conducted as the interests of the country requires. 1

However, the public servants need to shroud this aspect of their work in secrecy can be open to debate depending on one's view of how a group of people actually operate when discussing matters of importance. One is that some members (civil servants) would be afraid to air their views in public because this may expose them to public pressure and ridicule. Another view is that policy and discussion would be improved as servants would be forced to think more clearly and argue more coherently their respective viewpoints, if they were to be made in public.

Both arguments have merit, but the fact still remains that whatever a public servant may do or advise, the ultimate responsibility lies with the Minister and Cabinet. Nevertheless, the Minister-civil servant relationship and the advice given remain generally secret. Although leaks do occur and a great deal of material is released, all manner of information on public policy and administration is denied to the public, ranging from withholding figures on allocating beer tax money[2] through to the blocking of technical information relevant to the nuclear power debate.[3] A Minister has the option to release (subject to the dictates of Cabinet) what he likes.

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[1] Williams, op cit., p. 43.

[2] The Press, 18 May 1979.

[3] Freedom of Information and Open Government, op cit., p. 11.

One tactic is to release only part of a report, inevitably the part that reflects favourably on the government.[1]

Secrecy also extends to government corporations. For instance, many of the activities of Air New Zealand recently have had an air of mystery about them. In August 1979 the airline successfully applied to the Air Services Licensing Authority to have its profit statement withheld from the news media. Despite its claim that it was "a private company that has a business to operate"[2] the airline is state owned. Earlier in the year the merger of the National Airways Corporation with Air New Zealand was also conducted behind a shroud of secrecy. Seemingly the public must trust such organisations in their operations, as it must trust the public service in its actions and rely on accountability of the Minister through the ballot box and Parliament to achieve some measure of control.

In practice, however, the level of democratic control over individual Ministers is often negligible. Very few lose office because of their actions as a Minister.

To reiterate then, the constitutional arguments help place power in the lands of the executive. Secrecy gives that body the balance of power by allowing them to hold the balance of information necessary to decision-making. Also, by ensuring the confidentiality of this

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[1]The editorial in The Star, Thursday, 5 April 1979, claims Mr Muldoon used this tactic in diverting pressure for greater development (through cheap power) in the South Island.

[2]The Press, 30 August 1979, p. 1.

When discussing the first consideration there is perhaps the least anount of argument over secrecy on matters concerned with "national security". Generally, all freedom of information campaigners include this as one area in need of protection. Nevertheless, there is some debate as to how widely this definition should be drawn. This conflict of interests has been highlighted recently in the Sofinsky case.

The Soviet Ambassador to New Zealand, Mr Sofinsky, was expelled from this country on the 25th January 1980, after the S.I.S. had detected the transfer of "thousands of dollars" from Sofinsky to the Soviet aligned Socialist Unity Party (SUP),[1] an act that was in breach of diplomatic conventions. To date, however, this is the only information released in connection with the matter. The Ministeer in charge of the S.I.S., Mr Muldoon, has steadfastly refused to release any further information or evidence to back up these allegations based on the rationale that "vital interests were at stake".[2]

If Mr Sofinsky had been a New Zealander and had been accused of a crime (as Dr Sutch was) he would have been tried in a court of law. However, the government reasoned that expulsion was in order and that information must be withheld because the matter was one "of extreme sensitivity and delicacy".[3]

The material collected by the S.I.S. was assessed

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[1] The Christchurch Star, Friday, 25 January 1980, p. 5.
[2] The Press, Tuesday, 29 January 1980.
[3] The Christchurch Star, 25 January 1980.

by the Intelligence Council and this body, according to Mr Talboys, was convinced by the evidence.[1] The Council, which independently studies reports by the S.I.S., is chaired by the head of the Prime Minister's Department (Mr Bernard Galvin) and includes the Secretary of Foreign Affairs, the Chief of Defence Staff, the Director of the S.I.S. and heads of other departments involved in a case.[2] It was their agreement on the validity of the evidence that the government was able to make their decision to act.[3]

However, the refusal to release further information has allowed the SUP and the ambassador to deny the charges, which has permitted a measure of doubt to creep into the case. The Leader of the Opposition, Mr Rowling, called for the facts, claiming that the public had a right to know on what grounds the diplomat had been expelled.[4] However, the head of the S.I.S., Mr Molineaux, the Prime Minister and the Deputy Prime Minister, Mr Talboys, all in turn refused to give any information.

The sums of money involved were unspecified. The oddity of involvement of a high ranking diplomat was unexplained, and no evidence on the number of transfers, or the date of meetings was offered. This state of affairs has been criticised by The New Zealand Herald, who consider the embargo on information about the case unsatisfactory, and has led to public suspicion that the gov-

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[1] The Press, 29 January 1980.

[2] The S.I.S. Report, op cit., p. 101.

[3] The Press, 29 January 1980.

[4] Ibid.

ernment was playing politics.

> In the absence of explanation the public is simply left to nurse doubts. 1

The official silence has resulted in some suggestions (by the SUP in particular) that the move was either an attempt at discrediting the SUP, or another show of anger at the Soviet invasion of Afganistan. It seems as if the Soviets took the latter view and expelled the New Zealand ambassador to Moscow soon after.[2] Once again, the official silence enabled the Soviets to take this view as there are no 'facts' as such which proved Mr Sofinsky's guilt.

The important point in this affair is that there are no formal means of rendering the government accountable. Of course there is a basis for "trust in the system"[3] by virtue of the overseeing role played by the Intelligence Council. However, despite the level of agreement with expelling alleged foreign subversives, the failure to either release information or bring the accused to trial in some way undermines the accountability of government in such cases.

The Sofinsky case also demonstrates the view that secrecy must be maintained where disclosure may inhibit law enforcement. Any release of evidence or methods would, in the opinion of the government, prejudice and inhibit continuing investigations.[4] The same reasoning

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[1] The New Zealand Herald, 30 January 1980.

[2] The Press, 30 January 1980.

[3] Ibid.

[4] The Christchurch Star, Friday, 25th January 1980, p. 5.

could be applied to on-going police enquiries.

However, one area of legal procedure that has been a bastion of secrecy in the past, the Jury Room, has recently been breached. In a court decision, Lord Chief Justice Widgery (who ruled in favour of the executors in the Crossman Diaries case in 1975) found that the traditional obligation to the secrecy of events in the jury room could not, by law, be upheld in order to restrain publication of jury room secrets.[1]

These areas of secrecy, along with confidentiality of business contracts, and financial and budgetary information, find general acceptance (though not always) as subjects where, in the public interest, confidentiality overrides disclosure. This is, however, by no means the only information that is kept secret. One organisation has noted that in practice, as a general rule, the attitude of most government departments is against disclosure. This situation of course relates back to ministerial responsibility and administrative candour. However, Ministers and senior department officials do have some discretion in what to disclose.[2] It is here that most conflict occurs.

Individuals and organisations have been unsuccessful in gaining access to information on subjects such as electricity supply and demand, Beech Forest Research Committee minutes, details of the Health Department

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[1] The Press, 3 December 1979.

[2] Freedom of Information, Report of the Public Issues Committee of the Auckland District Law Society, 1978, pp. 4-5.

computer system, and the selection of a film censor.[1]

At the same time, information stored in the national archives (all public records after 25 years) can be limited in disclosure by imposing certain conditions or barring entry, if the Minister of Internal Affairs considers it desirable on the ground of public policy.[2] A special case regarding the release of information is the situation of the scientist. The majority of scientists in this country are employed by the government in the Department of Scientific and Industrial Research (DSIR), the Forest Service and the like. These are government departments operating under the same rules as any other government agency. The advice scientists give to the Minister is confidential. If the scientist criticises a government decision then he becomes a political opponent.[3] In a normal department this would be intolerable, and this is often so with scientists. However, for scientific enquiry to progress, information needs to be freely available. In general then, scientists can freely circulate technical information. Official exceptions to this are information about beech forest utilisation, methanes in the atmosphere and nuclear power.[4] It has already been noted that this rule of confidentiality has been applied to the first and third exceptions.

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[1] Freedom of Information and Open Government, op cit., pp. 11-18.

[2] Freedom of Information, op cit., pp. 3-4.

[3] D.K. Clifford, "The Scientist and Freedom of Information," Victoria University of Wellington Law Review, Vol. 9 (October 1978), p. 457.

[4] Ibid., p. 458.

However, there are other cases where government scientific studies have not had the results released. The Consumers Institute has complained of secrecy over investigations into cough medicines, ear tags (they had to do their own testing) and wine quality.[1]

Not only does the practice of administrative secrecy inhibit the flow of scientific information, but the same can be said of the adherence to a 'scientific' code of ethics. It is seen that the relationship between the scientist and his client (government department, private business and so on) is the same as a doctor-patient relationship and therefore must remain confidential.[2] Once again this is contradictory to the scientific method, and is a dilemma facing this field of research today. The result is, nevertheless, the same - a great deal of secrecy over most of the information held in government departments.

Information then on government policy can be withheld with impunity so long as the Minister or public servant sees fit to do so. Many of the examples mentioned could not be construed as affecting national security, or law enforcement, but nevertheless remain secret. Reasons can vary, from protecting administrative candour, or because the information was sensitive, or because governments are unwilling to trust the judgement of the public, fearing they will misinterpret or misunderstand

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[1] Consumer, "Why shouldn't Government files be open to the public?", No. 160, (1979), p. 86.

[2] Clifford, op cit., p. 454.

the information and its implications.

The third area (after internal workings of government and sensitive information) where it is argued confidnetiality must be maintained is the privacy of individuals and businesses:

> The workings of government should be made as public as possible in order to foster understanding between it and the government, but in the interests of freedom of the subject, the lives of the governed should be made as private as possible. [1]

This feeling has given rise to fears about the masses of personal and business information (census data, tax returns, credit data, criminal records and so on) now stored in data banks such as the Wanganui computer. Trepidation has been expressed about the possible abuse of this information, such as the release of computer files concerning electric power board subscribers to the Inland Revenue Department.[2]

The fear is that not only does the government own and control information necessary for complex decision-making, but also that it has access to centralised personal information (also useful in decisons, planning and so forth) and that this information can be abused, simply by releasing embarrassing data about an individual's private life or business affairs.[3] It is perhaps one area

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[1] Wardell, op cit., p. 42.

[2] The Press, 21 May 1979.

[3] The Relationship Between the Individual and the State in Regard to Privacy and Technology (Unpublished research paper in Master of Public Policy, 1979), p. 8.

where the public anyway are in favour of continued confidentiality.

If the arguments of collective and ministerial responsibility, administrative candour, scientific ethics, distrust of public comprehension and privacy do not entirely explain why there is secrecy in government, then perhaps the following quotation does:

> The only reason for classifying a document is for reasons of security ... A government official who thought that the disclosure of a document might cause embarrassment to H.M.G., he might well classify it confidential ... Naturally we mean politically embarrassing. It is not the business of any official to try, or allow the government to be embarrassed. This is what we are working for. Embarrassment and security are not really two different things. [1]

This is perhaps the most ominous justification. Under the democratic ideal, surely it is the obligation of every citizen to remain critical of the government, to show up its weaknesses, to stimulate debate, to force it to rectify its mistakes. Official secrecy, it would seem, is designed to prevent debate and criticism from afflicting governments.

Secrecy then is endemic to the whole political system, a method by which governments insulate themselves and ease public pressure on their busy lives. From the top, Cabinet, caucus, public service, through to the botton, party branch politics and party funding, there is secrecy to some extent or other, each with its own

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[1] David Tribe, The Question of Censorship (London: George Allen and Unwin, 1973), p. 257.

justification and each seemingly necessary to continued good government. The hypothesis forwarded by proposition two, that official secrecy was contradictory to democratic theory, can perhaps only be answered subjectively, depending on the standpoint one takes and is qualified by considerations of constitution, national security, privacy and public interest. Despite much rhetoric on the subject from reform groups, M.P.s Prebble and Minogue, and a host of other politicians including the Prime Minister,[1] the practice still persists. Parliament and the public are increasingly excluded from decision-making processes. Information is scarce and public debate stunted accordingly. The executive concentrates more and more power unto itself. The old theories of democratic limitation and control are obsolete.

Justifications alone, however, do not explain why secrecy should persist. Official secrecy must be enforced. Therefore, we turn to the primary weapon in this enforcement, the Official Secrets Act.

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[1] Press Statement, on the terms of reference for the Committee on Official Information, 28 July 1978.

CHAPTER THREE

THE DEVELOPMENT OF OFFICIAL SECRETS LEGISLATION: THE CASE OF THE UNITED KINGDOM AND ITS SIGNIFICANCE FOR NEW ZEALAND

When the New Zealand House of Representatives passed the Official Secrets Act in December 1951, their action was neither original nor unique. The New Zealand legislation owes its origins and present form to four British Official Secrets Acts. Thus for a fuller understanding of the New Zealand statute, its characteristics, implications and powers, we must first undertake a disucssion and analysis of the reasons behind, and the passage of, the British Act.

1889

The first Official Secrets Act of 1889 was seen as necessary after one particularly embarrassing leakage of information in 1878, by an underpaid, frustrated and ambitious Foreign Offic/ clerk, Charles Marvin. In exchange for money Marvin leaked secret information to a newspaper, the London Globe, about the forthcoming Congress of Berlin. The information was acutely embarrassing as it detailed the compromise worked out between Britain and Russia, before the Congress actually began. Although Marvin had actually leaked the document there was no evidence that a crime had been committed. No documents were stolen (he

had memorised them), there was no question of treason, and most importantly there were no legal sanctions on the communication of official secrets.[1]

It took ten years before the first moves were made to introduce some statutory protection of official documents, when a Bill was introduced to the Commons on June 7th 1888. After a brief explanation, and some equally scanty objections to the tenor of the Bill and its introduction, the House was adjourned. On July 12th, however, the Bill was withdrawn without explanation.[2]

The following year, however, the government made a more serious and successful attempt to give legal protection to official secrets. The Bill was given its first reading on February 25th, 1889.[3] On the 28th March, before the Bill was to be read a second time, the Attorney-General, Sir Richard Webster, gave it a brief sixty-eight word explanation:

> I wish to say just a word or two with regard to this Bill. It has been prepared under the direction of the Secretary of State for War and the First Lord of the Admiralty, in order to punish the offence of obtaining information and communicating it against the interests of the State. The Bill is an exceedingly simple one and I beg to move its second reading. [4]

Members immediately objected to the meagreness of its explanation. Despite their wishes to discover more of

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[1]Jonathan Aitken, Officially Secret (London: Wedenfield and Nicolson, 1971), pp. 7-14 and David Williams, Not in the Public Interest: The Problem of Security in Democracy (London: Hutchinson, 1965), p. 17.

[2]House of Commons Debates (Hansard) 1888, June 7. Col. 1495, and July 12.

[3]Hansard 1889, February 25, Col. 269.

[4]Aitken, op cit., p. 15.

what was behind the Bill, it was read a second time with little debate.[1]

It appears that members generally accepted that the Bill was directed exclusively at espionage, which in the light of the subsequent use of the Act, was a reasonably fair assumption. However, the important point to note is that it provided a precedent for future Acts, which were applied to actions other than espionage.

On the four occasions that it was debated before its final passage, the Bill received only seven columns of discussion.[2] There were a few feeble attempts at raising what the future would prove to be pertinent points. For instance, Dr Cameron remarked that the Bill restricted the flow of information to M.P.s.[3] However, the implications for the Press were not fully appreciated at the time as much of the disagreement was over the lack of explanation and claims that the legislation was rushed through at a time convenient to the government, but not to the Opposition.[4]

The government did, however, retreat on one point. Clause two of the Bill contained a reference to limiting the disclosure of official information where it was "contrary to the interests of the State or department of government or the public interest". The House was successful in this case, in securing the omission of

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[1]Hansard 1889, February 25, Col. 269.

[2]Aitken, op cit., p. 16.

[3]Hansard 1889, April 16, Col. 659.

[4]Hansard 1889, May 23, Col. 906.

"department of government" as they had claimed that in its orignial form the Act would have made it illegal to obtain information about mismanagement within a department.[1] Thus the government accepted that there was a difference between State secrets and department secrets, a distinction which Aitken suggests has escaped more recent enforcers of the Act.[2]

Therefore, with a final parting comment from Mr G. Campbell that the Bill was in fact not strong enough against the Press, who publish leaked information (a point pursued by later legislators) the Bill was passed in the Commons on June 20th. After a brief perusal of the Bill by the Lords, the Bill was passed and received the Royal Assent on 26th August 1889.[3]

1911

The 1889 Act operated unchanged for the next 22 years with what is described as "exemplary moderation".[4] It was rarely evoked, and when it was, this was generally for crimes concerning military and naval secrets. Despite the Act's emphasis on espionage, and the moderation in application, Williams suggests the Act was chiefly to deter citizens from improperly disclosing official secrets, and that foreign spies were openly tolerated. Nevertheless, many felt the Act was inadequate, and testimony to this are two unsuccessful attempts in 1896 and 1908 to

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[1] Hansard 1889, June 20, Col. 320.

[2] Aitken, op cit., p. 16.

[3] House of Lords Debates 1889, June 11.

[4] Aitken, op cit., p. 16.

have the Act strengthened. The former endeavoured, because of the failure rate of prosecutions, to put the onus of proof onto the defendant. Although this Bill was withdrawn, this new legal innovation[1] was to reappear in the 1911 Act.

The failure of a 1908 Official Secrets Bill, several unsatisfactory prosecutions, in the form of short sentences, the conviction of some German spies and a general recognition that the 1889 Act was inadequate helped ensure the speedy success of the 1911 Official Secrets Act. Coupled with this, international intrigue and the spy scares of the early 1900s had culminated in the Agadir gunboat incident off Morocco in 1911 which strained Anglo-German relations close to breaking point. In this atmosphere of tension an Official Secrets Bill was introduced to the Commons (after having been through the Lords) on 17th August 1911.

The circumstances of the introduction of the Bill has led to the belief that it was crisis legislation aimed at espionage, but according to the Franks Committee the Bill had long been discussed (as indicated by the aborted Bills of 1896 and 1908) and was definitely intended to have a wider scope than espionage. One of the main objects was to give greater protection against leakages of any type of information, whether or not it was connected with defence or security.[2] Thus the catch-all quality of section 2 developed by design and not accident.

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[1] Williams, op cit., p. 23.

[2] Cmnd 5104, pp. 25-26.

After its first reading the government immediately requested urgency.[1] The following day objections were voiced to the increased police powers under the Bill and to its hasty passage. The new powers granted were provisions for arrest without warrant, penalties for the harbouring of spies and a clause enabling the search of any premises without warrant in an emergency. Mr Morton, although not opposed to the Bill, thought it extraordinary that such a Bill could be passed without an opportunity to discuss it. The Attorney-General replied by noting that it was nothing new with regard to the 1889 Act, but that "unforeseen circumstances" saw a need to remodel the legislation.[2] However, what the Attorney-General had failed to realise was that by rushing through this Bill, coupled with the fact that the 1889 Act had not been fully discussed, the serious implications of the Official Secrets Acts were never comprehensively debated in the House. The important clauses 1 and 2 of the 1911 Act, which were the most frequently evoked and criticised clauses, were not seriously discussed in 1889 or 1911. The only points of meaningful discussion were the amended clause 2 of 1889 and the objections to part two of section 1 (1911) that stated

> it shall not be necessary to show that the accused person was guilty of any particular act ... he may be convicted if from the circumstances of the case or his conduct, or known character, it appears that his purpose was prejudicial to the safety or interests of the State.

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[1]Hansard 1911, April 17, Col. 2076.

[2]Hansard 1911, August 18, Col. 2251.

This had been the objective of the unsuccessful 1896 Bill but would, under the 1911 Bill, become law.

Most of the objections raised were to this clause, while the broad, catch-all language of the rest of the Bill escaped largely unchallenged. Sir William Byles belatedly claimed that it was a "very bad Bill" because of its speed of passage and the setting of precedents for further Bills.[1] The call was belated as the precedent had already been set in 1889. Despite further attempts at opposition, the Bill went through all its stages and was passed before lunch on the same day, receiving the Royal Assent on the 22nd August 1911, thereby repealing the 1889 legislation.

1920

Initially, the 1911 Act was used exclusively against cases of espionage. When the War broke out the government enacted very wide emergency regulations which generally superceded the Official Secrets Act. The Statute was then mainly used for misdemeanours and minor offences.[2] However, with the war over, the Act again became the main weapon against espionage and indiscriminate leakage of information when, in 1919 it was applied successfully in an area with no relevance to national security. In a case against a War Office clerk, the judge ruled that the accused had merely committed a departmental offence, but the Attorney-General took the case to the Old Bailey where

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[1] Hansard 1911, August 18, Col. 2360.

[2] Aitken, op cit., p. 23.

Mr Justice Avery ruled that the Act applied to any information and not merely to "secrets"[1] By doing this the judge demonstrated the full potential of the 1911 Act as a means, applying not only to espionage and the communication of secrets, but as a device which at the discretion of the government could be applied to all official information.

With civil unrest in London and terrorist activities in Ireland, the 1920 Official Secrets Act was given its first reading in the Commons on July 13th. There was a substantial gap until the second reading was proposed on December 2nd. The rationale of the Bill became clearer as the Attorney-General, Sir Gordon Hewitt, explained how the 1911 Act was inadequate during the war against the increasing ingenuity of spies and that the regulations which had effectively dealt with those spies during the war had now lapsed.[2]

The passage of the 1920 Act produced extensive debate, unlike that accorded the first two Official Secrets Acts. The most intense discussion centred around the implications the Act might have for the freedom of the Press. This is in many ways strange, as the clauses which contained the greatest danger for the press (sections one and two) were part of the 1911 Act.

Nevertheless, one new clause, section 6, did infringe on one of the basic tenets of press practice, that a journalist does not reveal his sources. The

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[1]Williams, op cit., p. 34.

[2]Hansard 1920, December 2, Col. 1585.

section made it the duty of a person (under threat of prosecution) to give any information in relation to an offence or suspected offence. That is, a journalist could be forced to reveal, for instance, from whom he obtained an official document.

Sir Donald McLean became the bitterest opponent of the Bill, claiming that it extended much further than the original Act intended (a claim not denied by the government) and that it attacked the rights of the Press and the individual.[1] Despite the government's claim that "if ever there was an innocent Bill this was one", the opposition continued to describe it as a war Bill and that it gave war power in peace time. The government replied that the Bill was necessary to punish not only spies, but indiscreet publications, while the Lord Chancellor strongly urged the curtailing of the liberty of the press.

Also for the first time in all the debate on official secrecy, Members began to object to the actual promotion of secrecy, that it was a result of the legislation, and suggested that the whole aim should be to establish a minimum of secrecy. The government on the whole did not deny that the Bill did give wide powers to the executive and some even complained that the Bill was not strong enough. Once again, as in 1889 and 1911, the Opposition found the brief explanation and vague language offensive. They suggested that personal opinions were in danger and that the wide language could lead to a

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[1]Hansard 1920, December 2, Col. 1585.

great deal of abuse.[1]

The fears held in 1889, which had enabled the deletion of references that would make scrutiny of government departments difficult, surfaced again. McLean suggested the Bill was aimed at "crushing opinion" which was in opposition to the government and its departments, rather than to the state. Another clause that gave the government new powers was section 2, which was similar to section 1 (2) of the 1911 Act, in that it put the onus of proof onto the defendant, by making the communication with a foreign agent evidence that his purpose was prejudicial to the interests of the state.

On December 16th the Bill went to committee of the whole House where Attorney-General Hewitt gave the assurance that "matters of this kind must, I think, be left to the good judgement of the executive".[2] Immediately before the third reading, Hewitt admitted once again that the Bill was not simply concerned with spies but would apply to other areas as well. Thus the 1920 Act which was only an amending piece of legislation, giving greater power and creating new offences, was passed unaltered and received the Royal Assent on 23rd November 1920.

Unlike the previous two Acts the 1920 legislation did not automatically apply to the dominions (including New Zealand) who, according to Hewitt, were contemplating more extensive legislation. When the Bill came to be debated in the New Zealand House, the government assumed the same stance as the Imperial government, leaving the

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[1]Hansard 1920, December 2, Col. 1589.
[2]Hansard 1920, December 16, Col. 983.

Bill unaltered and for the most part, unexplained:

> In 1920 the Imperial Government passed another Act which does not apply to the Dominions. The reasons were not given for the passing of that Act ... Parliament was asked to accept the statements of the Prime Minister that the amendments were necessary. The government of New Zealand has been informed in confidence of certain of these reasons and I regret Sir I am unable to give them in the House ... and I can only ask the House to pass the Bill. [1]

The House, however, took immediate exception to the Bill. Mr Sidey seemed baffled as to the reasons why the executive should need more power to combat espionage. The Leader of the Opposition described the Bill as "one of the most extraordinary laws that this House has been asked to pass and it contains some of the most dangerous principles".[2] He called it "prussian type legislation" which he felt was going backwards, "whittling away at the liberty of people ... (rather than) making their intellectual advancement possible".[3]

Attorney-General Lee's protestations that the Bill was not setting any precedents and that it should, like the United Kingdom Act, be taken on trust, came to no avail as the Bill never advanced beyond its second reading. Thus official secrets in New Zealand, until 1951 were only subject to the provisions of the unamended 1911 Act.

1939

Some of the most ardent opposition to the official

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[1] N.Z.P.D. 1921, December 12, Col. 1033.

[2] Ibid., Col. 1034.

[3] Ibid., Col. 1036.

secrets legislation was to the possibility that it could restrict not only espionage, but also the press and the public at large. Thus the 1939 Bill, which was introduced on the 9th of February, was hailed as a break through for the continued freedom of speech, as it amended section 6 of the 1920 Act, which had been adversely affecting journalists and professionals.

Section 6, which defined the powers of interrogation, was, under the short 1939 Bill, restricted to offences under section 1 of the 1911 Act and confined to cases of espionage.[1] The legislators, however, overlooked the fact that section 1 was not itself confined to simply espionage.[2]

Despite the high hopes for reform generated by this Act, no further official secrets legislation, or amendments, have yet been enacted in Britain. This is not the case, however, in New Zealand where the 1951 Official Secrets Act superceded the British legislation.

Thus a full understanding of the circumstances of the United Kingdom Acts rather than a simple analysis of their mechanics is desirable if a more complete comprehension of the New Zealand Act is to be achieved. The fact is that prior to 1951 New Zealand had comparatively mild official secrets legislation, as it included only the 1911 legislation. However, all the scant debate, incomplete observations, vague language, harsh penalties and war-like

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[1]Hansard 1939, February 9, Col. 1146, and November 15.

[2]Williams, op cit., pp. 74-75.

clauses that were such a part of the United Kingdom legislation, returned as a legacy embodied in the Act, to influence and affect the New Zealand statute that was heavily based on the British model.

CHAPTER FOUR

THE NEW ZEALAND OFFICIAL SECRETS ACT 1951

INTRODUCTION

If we accept Ralph Nader's metaphor,[1] that information is the currency of democracy, then surely the government is the bank where it is all kept. Nevertheless, governments, like banks, need to take precautions as to the protection of their assets. Seemingly, the main protection for the government comes in the form of the Official Secrets Act.

If, as the theory suggests, secrecy is undemocratic, then any measure that protects and encourages that practice is itself undemocratic. This is the premise offered by proposition three. To answer it requires a detailed analysis of the Act's history, structure and implications; how it got onto the statute books and why; what it proscribes and what its implications are; how important it is in the overall system of the protection of official secrets.

The origins of the Act are partially explained in the preceeding chapter. However, before discussing this relationship in terms of content between the United Kingdom legislation and the New Zealand Act, the first task

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[1] Spigelman, op cit., p. 9.

is to describe the events surrounding the passage of the Act which enables greater insight into the final form of the Act, the intention of it and attitudes to it.

SECRECY AND SECURITY IN NEW ZEALAND, 1951

At the same time as the Bill was before Parliament the New Zealand government was in the midst of a general reassessment of security measures. The Bristish security chief, the Head of MI5, Sir Percy Sillitoe, was in Wellington to finalise arrangements for New Zealand security organisations. Three objectives were forwarded as to the role of the organisations.

One, the surveillance of subversives; two, ensuring security services were adaptable to wartime circumstances; and three, the protection of official secrets.[1] The increased concern for security measures was adequately summed up in The New Zealand Herald for November 7, 1951:

> During recent industrial upheavals the question of security in New Zealand came to the fore, and with the development of events throughout the world and the infiltration of subversive activists, the government felt that there was an urgent need to review the security set up and ensure that proper safeguards were provided.

Among these "proper safeguards" were the Police Offences Amendment Act, the Industrial Conciliation and Arbitration Amendment (both designed to aid in the contest with subversives) and the Official secrets Act.

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[1] The New Zealand Herald, Tuesday, 6 November 1951.

Of the three the latter received the least attention from the public, Parliament and the press. The Bill was given its first reading on November 2nd. Comment at this stage was, however, almost non-existent.

The public attention during November and December was fixed firmly on the controversial Police Offences Bill, which gave the police wide powers and in its original form severly limited individual rights, including a widely drawn sedition clause. Another particularly draconian sanction amounted to a presumption of guilt of the defendant, and thus contrary to the traditions of British justice, transferred the onus of proof onto the defendant. On November 28th, after extreme public pressure, this article was amended.[1]

At the same time, however, a clause with similar intent and implication was included in the Official Secrets Bill. Despite the sentiments of The Dominion that "public makes laws better" and that New Zealanders retained a "healthy attitude to a long accepted concept of justice"[2] a clause similar to the one the "public had made better" persisted, apparently unnoticed and certainly unamended, in the Official Secrets Act.

This situation is indicative of the whole debate (or lack of debate) concerning the passage of the Act. The press and the public at large seem to have been satisfied with Attorney-General Webb's explanation that the Bill was modelled on official secrets legislation in

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[1] The Dominion, Wednesday, 14 November, and Thursday, 29 November 1951.

[2] Ibid., Editorial, Friday, 30 November 1951.

Britain and adapted for New Zealand conditions, and that there were "no clauses of any consequence that do not occur in various Official Secrets Acts in the United Kingdom".[1]

The Bill proceeded to the Statutes Revision Committee with only one minor amendment,[2] an alteration brought about by pressure from the New Zealand Scientist's Association. The minor change came in response to Association fears that any mapping performed on land by a private individual would seem to be illegal, unless the person charged could prove the contrary.[3] The clause was deleted and the Association duly satisfied. However, the scientists had also been concerned with other clauses, notably sections 3 and 4.[4] Their fears, however, were placated after legal advice suggested that

> from a practical point of view there is no reason to fear the 'onus of proof' aspect of subsection 2(a). 5

Further the solicitor giving the advice declared that:

> In my opinion, sections 3 and 4 of this Bill constitute no threat to the innocent activity of any person in New Zealand. 6

Further assurances of the need for the Act were provided by The New Zealand Herald which suggested there was a need to check the "innocent spreading of secret

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[1] N.Z.P.D., Vol. 926, November 15 - December 7, 1951, p. 1360. When reference to sections are made, for the full clause please refer to Appendix One.

[2] Ibid., p. 1359.

[3] "The Official Secrets Bill," New Zealand Science Review, 9 (November-December 1951), p. 190.

[4] For the full text of the Act please refer to Appendix One.

[5] The Official Secrets Bill," op cit., p. 191.

[6] Ibid., p. 192.

information" and that "for their own protection the people must on occasions be denied knowledge of their own affairs". To do this, it argued the government must equip itself with powers much wider than it ever expects to use.[1]

Opposition to the Act, nevertheless, was not entirely absent. Auckland journalists, for example, were alarmed at the Bill and protested to the Prime Minister.[2] Predictably perhaps some of the most vociferous objections came from radical left wing groups who, during the difficult year of 1951, had incurred the most condemnation as possible subversives. The communist weekly, Peoples Voice, called the Official Secrets Bill one of the

> three steps to tyranny, an aide to the replication of a Nazi police state. 3

The left wing publication, Here and Now, attacked the Bill rather unoriginally by reproducing the arguments used by H. Holland during the debate over the 1920 United Kingdom Act.[4]

In many ways the lack of debate is more significant than the actual passage of the Act. This was also noted by the Peoples Voice

> Little attention has been paid to the third of Holland's trinity of recent fascist-like Bills. 5

Certainly the Labour Party weekly devoted a great deal of space to the Police Offences and Industrial Conciliation

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[1] The New Zealand Herald, Editorial, 3 November 1951, p. 8.

[2] Peoples Voice, 21 November 1951, p. 6.

[3] Ibid., 5 December 1951.

[4] Official Secrets Bill 1951: What Holland Said in '21, Hyet Pseud, Here and Now, 2, No. 3, 1951.

[5] Peoples Voice, 21 November 1951, p. 5.

Amendments, but none at all to the Official Secrets Bill.[1]

Further words of caution were, however, offered by The New Zealand Herald. It warned that the country must guard against the abuse of the Act's powers, as it could be possible for some over-zealous politician to threaten the invocation of the Act to stifle criticism. The Herald's final, somewhat ironical comment, in view of the nature of the Act, urged the government to ensure that official secrecy did not conflict with legitimate freedom of information.[2]

With these brief and sporadic sentiments expressed, the Official Secrets Bill proceeded swiftly and inexorably through Parliament, where it was passed on December 5th, a little over a month after its first reading and two days before the end of the session.

Thus 1951, with the Cold War raging hot in Korea, the year of the waterfront dispute, the national emergency and perhaps the peak in the powers of the conservative National government,[3] saw three of the most controversial and restrictive pieces of legislation passed in New Zealand's history. The climate was favourable for the reformulation of official secrets legislation, which, as will be shown presently, resulted in the strengthening of the government's control over official information. In view

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[1] New Zealand Labour Weekly, December-January 1951-52, Vol. VII, No. 8.

[2] The New Zealand Herald, 3 November 1951, p. 8.

[3] For one of the first times in New Zealand's history an incumbent government actually increased its vote from the last election; National regained power in 1949 with 51.4% of the vote, while a snap election in 1951 increased its share to 54.0%.

of the circumstances the government took swift action, if not full advantage, with regard to the security threat. They now possessed multiple legislative weapons, giving powers to deal with any future sedition, subversion or similar security threat.

For the moment the government lived up to its promise that it had no intention of creating a "little MI5" in New Zealand.[1] The job of security intelligence (which involved, of course, official secrets protection) was carried out by Police Special Branch. However, five years later, it set up the Security Intelligence Service, on the British pattern.[2]

Nevertheless, in 1951 the government had at least an extensive and powerful Act, with which to protect its official secrets. An Act which received very little public attention or journalistic comment, and even less parliamentary debate,[3] and therefore seemingly gained wide public acceptance or at least acquiescence.

What then was the resemblance between the British legislation and the 1951 New Zealand Act, and perhaps more importantly, did the latter piece of legislation significantly alter the situation that existed prior to its passage?

The Relationship With the United Kingdom Legislation

Before the Official Secrets Act was passed in 1951

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[1] The New Zealand Herald, Tuesay, 6 November 1951.

[2] Security Intelligence Service Report, op cit., p. 18.

[3] Hansard reports only three pages of debate. The House went into committee, which is unfortunately not reported.

the nation's secrets were given protection by the Official Secrets Act (U.K.) 1911 and by section 61 of the Defence Act (N.Z.) 1909. The 1920 United Kingdom Act, and thus the 1939 Amendment to that Act, did not apply to New Zealand as Parliament had rejected the government's attempts to pass the Bill in 1921.

The 1920 Act materially strengthened the government's hand in Britain, particularly against the actions of spies. Without this Act then, New Zealand had, until 1951, relatively mild legislation dealing with theft or communication of official information.

However, in 1951, the Defence Act had been repealed and replaced by the New Zealand Army Act which did not contain any provisions covering the custody of official secrets. Strangely, one New Zealand newspaper thought that the Defence Act was the only one that applied to official secrecy in New Zealand, and thus its repeal necessitated an Official Secrets Act.[1] Perhaps this explains their position, which was one of acceptance and support. The relevant section in the Defence Act (s. 61) required heavy prison sentences for disclosure of information, including up to life imprisonment for communicating to a foreign state.

At the same time the 1920 United Kingdom Act was designed specifically to aid in the apprehension of spies. Therefore, with a general reappraisal of security in New Zealand, the repealing of a powerful anti-communication

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[1] The New Zealand Herald, Saturday, 3 November 1951, p. 10.

and spy Act and the absence of a specific spy Act (1920) obviously prompted the New Zealand government into devising its own Act. It did this by simply retaining most of the 1911 Act and adding the counter-espionage clauses of the 1920 Act. The result was a powerful and wide ranging Act, giving blanket protection to all government information. Only four clauses from 1911 do not appear in the 1951 Act, three dealing with technical matters of little importance,[1] and the other concerned with incitement to offend, a matter covered by by section 7 of the 1920 Act, which appears as section 9 in the New Zealand legislation.

However, the important addition to the New Zealand Act comes from 1920, with four new clauses of consequence, all dealing in one way or another with making the job of apprehending and convicting spies somewhat easier. The new clauses included: making communication with foreign agents sufficient evidence to convict a defendant on charges of spying under section 3;[2] the use of uniforms, forged papers, impersonation and so on to gain entry to prohibited areas;[3] interference with police who are carrying out duties at a "prohibited place" (generally defence installations) is made an offence;[4] where it is suspected that an offence has been committed, the police can be given powers to force information, under threat of pro-

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[1] S. 3: definition of a prohibited place; s.5: person charged with a felony under the Act may be convicted of a misdemeanour; s.11: saving for laws of British possessions.

[2] Official Secrets Act 1951, Section 4.

[3] Ibid., section 5.

[4] Ibid., section 8.

secution, from any given individual.[1] These new clauses, which invest a great deal of power in law enforcement agencies, were not, however, singled out for discussion by the limited number of those who laid objections to the Bill.

The section that received the most attention, the 'onus of proof' clause, was in fact already the law of the land, as it was part of the 1911 Act. At the same time the Bill was seen as vague and as a possible weapon enabling suppression of information,[2] but this vagueness had also existed before the 1951 Act came into being.

Nevertheless, the net effect was to give the police in New Zealand greater powers to investigate, apprehend and convict individuals who may have been involved in the communication of official information, whether by a bureaucratic leak, or by espionage. How was this done? The answer to this lies in the political and legal implications of the Act.

THE IMPLICATIONS: THE ACT AS AN INSTRUMENT OF CHOICE

One way to describe the Act is to see it as a means to two ends. The wide powers granted by the Act as discussed below, being the means and the prevention of spying, and restriction of official information being the ends. These ends, however, relate to one another.

The restriction of public access to documents may

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[1] Official Secrets Act 1951, section 11.

[2] Peoples Voice, 5 December 1951.

be seen as a means in itself of hindering the acts of spies. Conversely, by preventing spies from obtaining information, the Act also restricts public access. Although these two ends are related, it could not be held that the two activities involved (access to information and espionage) are equal in their consequences. Although access to, or release of, official information may be helpful to spies, it stands to reason that the activities of spies would be, or are intended to be, more detrimental to society's interests. However, the Act largely disregards any distinction that may lie between the two, as the extensive powers aiding arrest and conviction along with the stiff prison sentences, are applicable to both sets of activities.

How these powers are exercised is up to the government. In short, the Act may be used as a discretionary political weapon. This point is the most important one when one considers the Act. As will be discussed below, the wide powers, vague definitions and direction in application it may be used to harrass and muzzle those who are outspoken and unsympathetic in their views, as the authorities see fit. By looking at the sections of the Act, we can see that this is so.

Although each section seems to have, as indicated by the margin headings, specific purposes in mind, on the whole the wording is so general as to extend the ambit of each section beyond what it was originally designed for. Perhaps this is a function of the repeated failings of the British Acts, which induced four different governments to

amend and extend the official secrets legislation in an attempt to ensure that no offenders would escape conviction.

The first clause of substance, section 3, deals ostensibly with spying. It reads:

> 3 (1) If any person for any purpose prejudicial to the safety or interests of the state
> (a) Approaches ... or enters any prohibited place or
> (b) Makes any sketch ... or note which ... might be ... useful to an enemy, or
> (c) Obtains ... publishes, or communicates to any other person any secret official code word, or note ... or information ... which might be useful to an enemy - he commits an offence against this Act and is liable to up to 14 years inprisonment.

The wording is all encompassing, and it would seem that the line between espionage and simple communication or disclosure is somewhat blurred. Certainly it raises many questions. What is a 'purpose prejudicial to the safety or interests of the state'? This is rather a vague concept, as discovered in Chapter Two, and would presumably be argued about in any court case, where the prosecution (government) would seem to have an advantage in defining what could be deemed to be prejudicial. Could the interests of a government be construed to coincide with the interests of the state? Is the mere receipt of, or publication of, information punishable by 14 years imprisonment? These questions can only be answered by seeing how the Act has been applied in practice. This will be attempted in later sections of this chapter, but it does seem clear that section 3 is open to wide interpretation.

Conviction under section 3 is made considerably easier than would normally be the case in British law by

the provisions of section 4. Unlike section 3, this clause had not applied in New Zealand prior to 1951, as it had been part of the rejected 1920 Act. It materially strengthens the Act, and thus the government's hand, by declaring that

> 4 (1) In any proceedings against a person for an offence against section3, the fact that he has been in communication with, or attempted to obtain information, or attempted to communicate with a foreign agent ... shall be evidence (emphasis added) that he has, for a purpose prejudicial to the safety or interests of the state, obtained or attempted to obtain information which is calculated or intended to be directly or indirectly useful to an enemy.

It would seem that a person can be convicted of spying (even without actually communicating information) if he or she has met or visits a foreign agent or goes to his address or is in possession of an agent's address.

The first instance of the transferance of the burden of proof from the Crown to the defendant also appears in this section. To ensure acquital, the person charged must prove to the contrary that he/she did not meet, consort or visit with a foreign agent. Personal intention is not a factor. In legal terms, mens rea (for a guilty act there must be a guilty mind), a basic tenet of law, does not generally apply in this case.

In defence of the section, it can be pointed out that certain facts can be admissible as evidence, but this is not proof of an offence.[1] What does this mean exactly? If taken at face value, it would seem that any evidence of a meeting can be brought, which under normal

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[1] New Zealand Science Review, op cit., p. 191.

circumstances would not be admissible, even if it is irrelevant to the rest of the case. A defendant therefore must, to aid his/her case, produce evidence to counter allegations that, in other circumstances, may have never been allowed to have been presented as admissible evidence.

Already, then, even for an offence as serious as spying, the Act is showing itself to be widely drawn, powerful and oppressive.

Section 5 is more exclusively involved with the activities of spies, as it deals with some of the traditional methods of espionage, the unlawful use of uniforms, forgery, impersonation and false documents. Although these espionage clauses could apply to the simple act of disclosure, any prosecution for such an act would more likely be brought under section 6.[1] For this reason it is certainly the most controversial and vilified of all the sections, as it relates directly to the dissemination and freedom of information to the public.

> 6. Wrongful communication of information - (1) If any person, having in his possession or control any secret official code word or password, whether of New Zealand or of any other country, or any sketch, plan, model, article, note, document, or information which relates to or is used in a prohibited place or anything in a prohibited place, or which has been made or obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding office under His Majesty or under the Government of any other country, or which he has obtained or to which he had access owing to his position as a person who holds or has held such an office, or as a person who holds or has held a contract made on behalf of His Majesty or on behalf of the Government of any other country, or a contract the performance of which in whole or

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[1]Wardell, op cit., p. 33.

in part is carried out in a prohibited place, or as a person who is or has been employed under a person who holds or has held such an office or contract -

(a) Communicates the code word, password, sketch, plan, model, article, note, document, or information to any person other than a person to whom he is authorised to communicate it or a person to who, it is in the interest of the State his duty to communicate it; or

(b) Uses the information in his possession in any manner, or for any purpose, prejudicial to the safety or interests of the State; or

(c) Retains the sketch, plan, model, article, note, or document in his possession or control when he has no right to retain it or when it is contrary to his duty to retain it, or fails to comply with any directions issued by lawful authority with regard to the return or disposal thereof; or

(d) fails to take reasonable care of, or so conducts himself as to endanger the safety of, the sketch, plan, model, article, note, document, secret official code word or password, or information -

he commits an offence against this Act.

(2) If any person, having in his possession or control any sketch, plan, model, article, note, document, or information which related to munitions of war, whether of New Zealand or of any other country, communicates it, directly or indirectly, to any person in any manner, or for any purpose, prejudicial to the safety or interests of the State, he commits an offence against this Act.

(3) If any person receives any secret official code word or password, or any sketch, plan, model, article, note, document, or information knowing or haveing reasonale ground to believe, at the time when he receives it, that the code word, password, sketch, plan, model, article, note, document, or information is communicated to him in contravention of this Act, he shall be guilty of an offence against this Act, unless he proves that the communication to him of the code word, password, sketch, plan, model, article, note, document, or information was contrary to his desire.

Section 6 makes it illegal to communicate any information without due authorisation. No weighting is made or distinction given with regard to classified or unclassified

information or between information that would be harmful or do no harm to New Zealand.[1]

The section is long and complex and it can never be clear what kinds of action involve a risk of prosecution.[2] This is unfortunate, as one would consider that an Act which applies to all civil servants and all information would have the advantage of clarity. The factor which upsets this, however, is the need for the consent of the Attorney-General to prosecute. No-one in this situation can be sure whether or not any proceedings will be taken against them. This important point will be discussed further under section 14.

One explanation for the breadth of section 6 is that it is a "long stop" or a "safety net" which gives an extra margin of protection in the event of failure of other safeguards.[3]

The implications of section 6 for the freedom of information are obvious. If the conduct of full and open debate in a democracy depends to a large degree on the availability of information, then the provisions of this section must seem a formidable obstacle to that debate. Of course, masses of information does get released, as authorised by the Minister or senior public servants, but the section places real restrictions on the free flow of information. The full potential of the Act to suppress official information, and thus debate, is enormous. It

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[1] P.S.A. Report, op cit., p. 1.

[2] Wardell, op cit., p. 27.

[3] United Kingdom Interdepartmental Committee on Section 2 of the Official Secrets Act (1911), by Lord Franks, British Parliamentary Paper, Cmnd 5104, 1972, p. 30.

is perhaps worthwhile to reiterate the point that the Act can be seen as a discretionary political weapon. Blanket suppression would, generally, be unacceptable, but selective suppression through the use of this wide and ambiguous section could be employed to silence the awkward critics of an administration, but not used to such an extent as to inflame public opinion. Section 6 carried to its full potential by an unscrupulous government could be a dangerous and oppressive weapon.

Nevertheless, and despite the books and articles, and the Franks Committee enquiry, all concerned with the operation of section 6 in New Zealand and the corresponding section 2 in the United Kingdom, the Act is not significant or controversial for this clause alone.

Apart from the previous clause, perhaps the most controversial section is section 7, which many critics argue is a dangerous departure from traditional criminal law. The section states that

> 7. On prosecution under this Act if, from the circumstances of the case or the conduct of the accused person, or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the State it shall be deemed that his purpose was such a purpose unless the contrary is proved...

Section 4, which was in a similar vein, applied exclusively to section 3. The ambit of section 7, however, is drawn to include any offence under the Act. This clause, along with section 4, severely undermines a basic tenet of criminal law, by reversing the burden of proof. Instead of the prosecution having to prove its case beyond reasonable doubt it would be true to say that the Crown

only has to offer adequate circumstantial evidence,[1] or allude to the unsuitable character of a defendant. To prove the contrary, the accused must bring evidence to refute the prosecution's case. The clause must substantially enhance the chances of a conviction.

Whilst sections 8 and 9 are comparatively minor clauses, dealing with obstruction of police or those on guard duty and with the harbouring of spies, section 10 is a different matter. Like section 7, it is a departure from normal practice. It states:

> 10. Every person who attempts to commit an offence against this Act, or solicits or incites or endeavours ... or does any act preparatory to the commission of an offence against this Act he shall be deemed to have committed that offence.

By making an act preparatory to the commission of an offence an offence in itself, it becomes a unique clause outside of wartime regulations.[2] This fact is significant as it suggests that the Official Secrets Act could be described more accurately as a wartime measure. Section 10 corresponds with section 7 of the 1920 U.K. Act, which was passed in lieu of lapsed wartime regulations.[3]

Section 10 (N.Z.) is perhaps a good example of a clause with wartime intent applying in peacetime. As the activities and rights of the individual are generally restricted by war measures during any hostilities, section

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[1] The Official Secrets Act 1951, Auckland District Law Society, Public Issues Committee, 1975, p. 5.

[2] Wardell, op cit., p. 32.

[3] One of the major criticisms of the 1920 Act when it was before Parliament, both in the U.K. and N.Z. was that it very much resembled a wartime measure.

10, along with many of the other clauses, could be seen as much more restrictive in peacetime than should be the case.

Section 11, the only individual clause in an Official Secrets Act that has to some degree been reformed, also bears little relationship with criminal law in general. In essence, it denies a person the traditional right to silence before he/she has been charged with an offence.[1]

> 11 (1) Where the Commissioner of Police is satisfied that thereis reasonable ground for suspecting that an offence against this Act has been committed and for believing that any person is able to furnish information ... he may apply to the Attorney-General for permission to exercise powers ... (to) ... authorise an Inspector of Police to require the person believed to be able to furnish information to give any information in his power relating to the offence ... and if a person ... fails to comply with such a requirement ... he commits an offence against this Act.

The New Zealand section is in fact more restrictive than the United Kingdom counterpart, in that it can apply to <u>any</u> offence, whereas in Britain the power is confined specifically to offences involving espionage under section 1 (U.K. Act).

Sections 12 and 13, in general, conform to the traditional pattern, giving, respectively, power to arrest without warrant in an emergency (again perhaps a war power) and provision for the issue of search warrants.

For the Act to be accurately described as a discretionary political weapon, it must satisfy two criteria. One, that the Act has power to coerce. This is certainly

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[1] Wardell, <u>op cit</u>., p. 31.

the case with many sections granting government extensive and potent powers . The second criterion is that the government must have some discretion or choice as to the application of the Act. It does have a choice in what it may release. It can also exercise discretion in the prosecution of would-be offenders.

> 14 A prosecution for an offence against this Act shall not be instituted except by or with the consent of the Attorney-General ...

Section 14, at first glance, looks to be a clause which could protect some offenders from possible prosecution on matters of trivia. However, it could in effect be a device which gives the government a statutory right to exercise discretion, where the danger is that a wide and ambiguous law can be invoked at the government's pleasure, and it may please them to prosecute in order to silence an outspoken critic or a troublesome dissenter.

One view is that this situation is not far removed from government by arbitrary decree.[1] Rather than being a safeguard against oppressive action, it is a safeguard dependent on the will of the executive.[2] The Act gives the executive power over prosecution, by placing the initiative in the hands of the Attorney-General, who is of course a politician and member of Cabinet, although in such cases he is acting in his legal and not his political role. The Franks Report found no evidence to suggest he had ever done otherwise.[3]

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[1] Official Secrets Act 1951, op cit., p. 4.

[2] Wardell, op cit., p. 34.

[3] Cmnd 5104, p. 20.

As governments were seen traditionally as inherently untrustworthy, the democratic model was designed to limit and control them in their actions. Section 14, however, hands the government power on trust to use at their own discretion to safeguard the rights of the people as they see fit.

Section 14 is the last of the important clauses, with sections 15 (trial and punishment), 17 (application to island territories) and 16 (extent of Act) bearing no relevance to the overall question of information in a democracy. The only point that could be made concerns section 15, that where in the Act punishment is not specified, an offender can, on conviction, be sentenced to a maximum of 7 years on indictment and 1 year if tried summarily.

The point that is important when discussing the Official Secrets Act is that of its potential. The suggestion is not that the Act is an oppressive device, which the government uses to stifle debate, harrass critics and imprison dissenters in order to satisfy its own ends. Rather, the Act has potential to muzzle or neutralise important people, or people that are saying important and perhaps unsympathetic things, which may be perceived by those responsible for security as undesirable.

Further to this, however, is the power that the Act has to muzzle those inside the bureaucracy from letting the public know of actions by the government which are improper, dishonest or contrary to public interest. The case of one group of public servants helps to illustrate

this point. The great majority of scientists in New Zealand are employed by the government and are thus subject to the normal restraints and controls that operate on any public servant. Although the scientific method demands that information be freely available and that findings be open to criticism,[1] those scientists that are employed by the government and particularly those in the DSIR are directed that

> extreme care must be taken to ensure that anyone issuing statements does not without first obtaining the Director-Genral's approval issue any statement which contains any criticism, stated or implied, of the government of the day. [2]

This direction applies more explicitly to the situation where a scientist is not free to offer public criticism on government policy in areas that are close to or in his own areas of expertise. Although this view has certain justifications from the government viewpoint, such as protecting top secret defence information, or maintaining trust between a Minister and his advisers,[3] the fact still remains that scientists are not free to speak out on government indiscretions or mistakes. Secrecy and the wide sanctions of the Official Secrets Act can, by muzzling in this case scientists but also public servants in general, prevent exposure and criticism of a government.

Secrecy Reinforcement: Other Factors

In seeing the Act in the above terms, we must not forget or neglect the importance of other factors which

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[1] Clifford, op cit., p. 457.

[2] Ibid., p. 456.

[3] Ibid., p. 457.

are involved in the protection of official information. These factors are significant in that they help establish the true relevance of the Act in the overall scheme of official secrecy. They fall roughly into two groups. Firstly, other formal limitations which enforce secrecy. These include secrecy provisions in other legislation, public service regulations and rules, and of course the role of the S.I.S. which has a statutory link with the Official SEcrets Act. The second group of limitations are those which operate within the institutions of government, particularly the public service, which could be described as informal.

Firstly, then, the formal contraints. Some pieces of legislation contain specific reference to secrecy. Perhaps the most important of these is section 78 of the Crimes Act 1961.

> 78 Communicating secrets - Everyone owing allegiance to Her Majesty the Queen therefore is liable to imprisonment for a term not exceeding 14 years who within or outside New Zealand -
>
> (a) with intent to prejudice the safety, security or defence of New Zealand communicates ... any military or scientific information ... the communication of which is likely to prejudice the safety, security or defence of New Zealand; or
>
> (b) Conspires ... to do anything mentioned in Paragraph (a) of this section.

In view of the broad provisions of the Official Secrets Act, this section seems rather unnecessary. It deals exclusively with information regarding 'national security', a function adequatley covered by sections 3, 4 and 6 of the Official Secrets Act.

The duplication of information protection continues with the Public Service Regulations of 1964, specifically numbers 42 and 43. Regulation 42 requires a public

servant to complete a "statutory declaration to the effect that his/her attention has been drawn to the provisions of the Official Secrets Act 1951".[1] In addition:

> (2) An employee shall not use for any purpose, other than for the discharge of his official duties, information gained or conveyed to him through his connection with the public service.
>
> (3) No information out of the strict course of official duty shall be given, directly or indirectly, or otherwise used by an employee without express direction or permission of the Minister.
>
> (4) Communications to the press or other publicity media on matters affecting any department of the public service shall be made only by the employee authorised to do so. 2

Once again there is a doubling or 'over-kill' in the provision for protection of official information. Regulation 43 declares that no employee is to take documents or copies from official records for any purpose whatever, other than in connection with his duties.[3] As a final reminder, public servants are told that "information obtained officially is confidential and must not be disclosed to, or discussed with, any person ... who is not officially concerned in the matter".[4]

Further to these regulations there are provisions for secrecy in Acts such as the Wanganui Computer Centre Act (designed to protect individuals' privacy) and the Statistics Act, which has an Oath of secrecy, again the intent being to keep personal details confidential. There is then, a plethora of secrecy provisions in statutory or

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[1] Public Service Manual, Section L. 27.

[2] K.J. Keith, "Constraints on Freedom of Dissemination of Scientific Knowledge," New Zealand Law Journal, 7 December 1976, p. 513.

[3] Ibid.

[4] The Official Secrets Act, P.S.A. Research Paper, No. 9, January 1978, p. 1.

departmental regulations which gives the government further control over official information. However, these provisions are only laws, and laws must be enforced. In the case of the regulations above and in some instances the Official Secrets Act, this is a task for the departments themselves, or the police.

However, a more important body in the protection of official information is the Security Intelligence Service. In fact, one view is that the service was set up originally for this express purpose. In 1956 the Americans informed the Holland government that they would be denied the use of top secret American documents unless New Zealand set up an effective service to protect them. Rather than lose prestige, and under pressure from the military, Mr Holland created the S.I.S. It replaced the Police Special Branch and was modelled on MI5 and the F.B.I.[1] Although this cannot be confirmed, the S.I.S. is tied directly to the Official Secrets Act by the definition of 'espionage' (in the S.I.S. Act 1969, and the 1977 Amendment) as "any offence against the Official Secrets Act which could benefit the government of any country other than New Zealand". If the interpretation of 'espionage' under the Official Secrets Act can be drawn widely, then the role of the S.I.S. is widened accordingly.[2]

Not only does the service, as part of its duties, investigate (it has no power of arrest) any impropriety

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[1] H.W. Orsman, in Comment, Vol. 7, No. 4, 28 September 1966, p. 2.

[2] Minogue, in New Zealand Law Journal, op cit., p. 220.

in the management of official information, but also the activity of the service itself is clandestine and secret.

> To fulfil its responsibilities the service must operate largely in a covert manner, therefore the number and identification of staff, details of vehicles, methods of work, operation and organisation are not made public. 1

This attitude is borne out by the recent case involving the Russian Ambassador (see Chapter Two, page 39).

We have, then, the Official Secrets Act as a centre piece, surrounded and supplemented by numerous statutory and regulatory provisions, all of which, in theory, combine to give blanket protection to information held by the government. To ensure that these laws are upheld there is the S.I.S.[2] Taken in total, this is a formidable block to the free flow of information. It must be stressed again, however, that a great deal of information is released by the government, most of it readily.

Nevertheless, the fact remains that the initiative for disclosure is with the Minister, who is self authorising and senior civil servants, who operate under implied authorisation stemming from the authority of the Minister.[3] These are the formal constraints. The next task is to analyse the informal methods of information protection, and in so doing, describe the relative importance of both the informal and formal limitations as they apply to government institutions. First , the Public Service.

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[1] Statement by the Service, in Security Intelligence Service Report, op cit., p. 73.

[2] For a discussion of the control of the S.I.S., refer back to Chapter Two, p. 40.

[3] Cmnd. 5104, p. 14.

As the Official Secrets Act is designed in part to determine the correct management of official information, and as civil servants are the researchers, compilers and writers of most of this information, then it is reasonable to assume that the Act is of paramount importance to the conduct of administration. The situation is one where:

> A rule requiring secrecy is established with disclosure being authorised only in unusual cases and the path of least resistance for the bureaucrat becomes that of following the general rule and avoiding recognition of disconcerting exceptions. 1

Is this in fact the case? Certainly the Franks Committee found in Britain that several servants had admitted to being prevented from releasing, under pressure from the Act.[2] Similar situations arise in New Zealand. After a major survey was undertaken of New Zealand wine quality by the Health Department, the results were withheld because

> until we have a Freedom of Information Act we can't do anything - we'd be breaking the Official Secrets Act. 3

However, internal, often imperceptable and informal, restraints also operate. Max Weber saw the tendency toward secrecy as a function of an administrator's lust for power.[4]

Another explanation is that it is the nature of a bureaucracy to transfer procedures into purposes and that an obsession with secrecy is a single manifestation of

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[1]Francis E. Rourke, Secrecy and Publicity: Dilemmas of Democracy (Baltimore: The John Hopkins Press, 1961), p. 22.

[2]Cmnd. 5104, p. 19.

[3]The Christchurch Star, Wednesday, 16 January 1980, p. 3.

[4]Max Weber, quoted in Rourke, op cit., p. 21.

this.[1] To achieve these aims a department may not rely on measures such as the Act (although they are obviously important) but on semi-formal internal restrictions. The Franks Committee discovered this to be an important factor in the management of information.[2] On the occurrence of a Cabinet paper leak in New Zealand, a State Services Commission official said that in most cases of disclosure a complaint was made to the department, rather than the police,[3] and thus the matter is dealt with internally.

In 1975 a charge was not brought under the Official Secrets Act because, as the then Prime Minister, Mr Rowling points out

> Someone needed to have acted in a way which was detrimental to the security of the nation

to be charged.[4] This is an interesting point in itself, in that it demonstrates perhaps to the credit of the government at the time, that prosecution in this case at least, under the Act, would only be taken if the breach was of sufficient consequence. However, what is of 'sufficient consequence' is again a matter left to the discretion of the government.

The type of internal discipline employed can come in the form of fines and reprimands (for breaches of rules and regulations) or an equally, if not more severe,

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[1] Max Weber, quoted in Rourke, op cit., p. 22.

[2] Cmnd. 5104, p. 33.

[3] The Press, 27 May 1974.

[4] The Christchurch Star, 12 August 1975.

method of continuous punishment of an employee while they remain in the service. As Franks said,

> The informal sanction lies in the fact that a civil servant who is regarded as unreliable, or who tends to overstep the mark and talk too freely, will not enjoy such a satisfactory career as his colleagues with better judgement and greater discretion. He may fail to obtain promotion, or he may be given less important and attractive jobs. A great majority of civil servants wish to perform their duties conscientiously, and to enjoy successful careers. These are powerful, natural incentives to proper behaviour. [1]

A less sympathetic view of administrative secrecy is that it stems from sheer bloody mindedness, a desire to protect masters and contempt of the layman's ability to understand.[2]

The civil servant then is surrounded both by rules and regulations, departmental pressures, and perhaps his own personal feelings of sympathy, loyalty or arrogance. On the whole, the combination seems to work. Certainly unauthorised publication or release occurs, but only infrequently, and generally with little consequence.

Civil servants are not the only individuals liable under the Act. Cabinet, which generally relies on its own internal discipline to maintain confidentiality, does not escape the ambit of the Act. In 1915 British Prime Minister Asquith confirmed that Cabinet Ministers were fully subject to the authority of the Official Secrets Act.[3] In practice, however, Ministers are self-authorising

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[1] Jacob, op cit., p. 47.

[2] "Official Hide and Seek," Economist, Vol. 265, No. 5 (1977), p. 20.

[3] Williams, op cit., p. 45.

and it would seem unlikely that a Minister would be prosecuted for disclosure, no matter how indiscreet. Once again, discretion to invoke resides with the government.

A scandal in Britain in 1938 over a technical breach of the Official Secrets Act by a M.P., Duncan Sandys, although not resulting in a prosecution, confirmed that M.P.s too were subject to the Act, despite the protection of parliamentary privilege.[1]

The final, and perhaps most vital, area where the Act can have a debasing effect on the democratic model is that of the press.

THE OFFICIAL SECRETS ACT AND THE PRESS

One of the main fears that was held in connection with the Official Secrets Act, both within Britain and New Zealand, was the effect it would have on the press. If the Act and official secrecy in general deny the press information, then they must either be satisfied with the official version, or obtain information another way. Stealing documents is one, 'leaking' information to the press is another. Although the former is a drastic means under the Act the two methods are both criminal offences.

However some leaks do occur. Many originate from the Minister himself, while others may occur through idle chatter or the leakage by a civil servant of a whole document, or part of it or the mere fact of its existence.

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[1] The Round Table, Vol. 28 (September 1938), pp. 803-805.

It stands to reason that leaks by a member of the government are designed to aid the government's position, while those occurring by accident or without at least tacit authorisation may not always be complimentary.

Some leaks or 'insider' information finds its way to weekly newsletters such as TransTasman and The Main Report. Both news sheets described as "private", often contain advance warning of government action. For instance, reports of caucus meetings[1] which are secret, prediction of legislation, amendments and their content,[2] and descriptions of disagreements between top civil servants and members of Cabinet.[3]

Some of the reports could be based on rumour, speculation or deduction, while others may originate from sources inside the government, such as "our man on the hill".[4] The point to note is that the newsletters seem to obtain a degree of insider information and much of it does not reappear in the conventional press. This information is, in effect, leakage from government circles yet the newsletters are openly tolerated. Once again the government is using discretion by allowing them to continue even though some of the material they publish is in clear breach of the Act.

Perhaps one reason is that the letters are available only on subscription, and do not circulate to the extent

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[1] Trans-Tasman, No. 79/319.

[2] The Main Report, Friday, 7 December 1979.

[3] Ibid., Friday, 30 November 1979.

[4] Ibid., Friday, 16 November 1979.

that newspapers do. Another may be that the presentation is not sensationalist or generally too controversial. These newsletters do, however, circulate among the departments and Ministers in Wellington and are one way of finding out what is going on elsewhere in the establishment. Thus these leaks are necessary (and therefore tolerated) for the functioning of the system.

However, leaks that do reach a greater audience through the press, and do tend to be controversial, are treated in a somewhat different manner. In October 1977 documents were leaked from the Department of Trade and Industry. Although the leakage was more of an embarrassment (or perhaps _because_ it was an embarrassment) to the government rather than a cause of concern for the country as a whole, police investigations were undertaken and there were suggestions that the leakage had been a breach of the Official Secrets Act.[1]

More recently the New Zealand University Students' Association released a confidential Cabinet paper concerning the five yearly grant to Universities. The students had claimed that the public version that the Minister of Education, Mr Wellington, had given was contradictory to what the Cabinet paper contained.[2] This release, which was acutely embarrassing to Mr Wellington, has led to police enquiries and consideration of the possibility of charges under the Official Secrets Act.[3] Once again, the

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[1] _The Press_, 5 October 1977.

[2] _The Christchurch Star_, 12 February 1980.

[3] _The Press_, 14 February 1980.

release was more remarkable, not for the content of the document, but for the reaction of the government. The potential of the Act is again demonstrated. It provides a means whereby continued 'leaks' are either deterred by threat of government action, or are negated by the diversion of police investigations and the suggestion of court proceedings.

The situation of the press in all this is potentially precarious. The Act makes them more liable than most, as it is their duty to investigate and collect information. Some of it comes in the form of leaks which can, of course, be in contravention of the Act. A journalist who receives such information can be charged with an offence under section 6, while under section 11 a journalist may be required to reveal the source of his information.

One case which demonstrates the difficulties the Act poses for journalists occurred in 1971 in the United Kingdom. The previous year The Sunday Telegraph published an article which quoted from a British diplomat's report on the Nigerian Civil War. This was alleged to show that a Minister had misled Parliament on the extent of British involvement. The Telegraph, its editor, Cairns, who communicated the document, and Jonathan Aitken, who received it, were charged in 1971 under section 2 of the British Official Secrets Act 1911. The prosecution contended that the release of confidential diplomatic reports would damage the diplomatic system. Also, as

Colonel Cairns had signed a form recognising the existence and authority of the Act, he was aware that he had no right to communicate the report. Aitken and the Telegraph, the Crown alleged, both knew that receiving a document and publishing it were offences.

Although the Crown lost the case, largely because it had to spell out the official view of the ambit of section 2, which was unacceptable in a British court,[1] it does point out how a journalist, by following his duty to research and publish, can place himself outside the law.

Another case involving section 2 (U.K.) occurred in February 1977 when two journalists and a retired corporal were arrested and charged under the Act. The circumstances of the case are not important (the corporal communicated information about government surveillance methods he had learnt seven years previously to two journalists who published it)[2], but the action taken is. The men were held without being charged for 45 hours, while Special Branch searched and stripped the journalists' homes of personal and private papers.[3]

Once again the case demonstrates the power the Act grants. Although one can never be sure if the action was designed to harass (there was no conviction) the men involved. As it was the men suffered irritation and inconvenience from the Special Branch action.

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[1]Minogue, op cit., p. 216.

[2]James Michael, "No Right to Know," New Statesman, Vol. 93 (25 February 1977), p. 241.

[3]Robin Cook, "ABC of Special Branch," New Statesman, Vol. 93 (6 May 1977), pp. 589-590.

The danger is that government may prevent embarrassing information from coming to light. This is perhaps a perfectly reasonable objective for them to have. The same could be said about the journalists' task of investigating and exposing any weaknesses and indiscretions in government action. The Official Secrets Act, however, gives the government an unfair advantage in the fulfilment of their objective over that of the journalists.

The discussion above brings us to an important state in the analysis: how the Act has been used in New Zealand.

THE ACT IN ACTION

One of the major defences for the continued existence of the Act is the notion that it is "framed so comprehensively as to inhibit any regular policy of enforcing it",[1] and that it is "too absurd to do much real damage".[2] It is true that the New Zealand Act, in particular, is conspicuous by its scarcity of utilization. Once again, though, the worth of the Act in Franks' words is not to be measured in convictions and prosecutions. The important point is its potential for use, and how any actual cases under the Act demonstrate this potential.

The first occasion that the Act was invoked occurred in April 1969. An outspoken Victoria University lecturer,

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[1] Keith, op cit., p. 513.

[2] "Messing About with a Mess," The Economist, Vol. 245 (7 October 1972), p. 15.

Mr R. Boshier, was interviewed by police, who produced an underlined section of the Act, presumably section 11, requiring persons to give information in connection with an offence. Boshier had, at the recent Labour Party conference, brandished a list of names, allegedly members of the S.I.S. The police warned that if the list was not produced and its source revealed they would search his room without a warrant.[1] Although the police action did not proceed any further the case is an interesting one. Firstly, the section under which the police took their action was one that was new to New Zealand law, until the 1951 Act was passed, in that it derived from the 1920 Act. Secondly, and to reiterate, this section had been amended in Britain in 1939, where the ambit of it was restricted to espionage only. However this was not done in the New Zealand Act, with the section applying to any offence against the Act.

These developments raise many points. If there had been no 1951 Act the interview would never have taken place, at least in the circumstances that it did, because there would have been no legal basis for the interview. Depending on the definition of 'espionage', if the New Zealand section had followed the British example the interview again might not have occurred. Also the fact that the action was taken under a section from the 1920 U.K. Act confirms the belief that the legislation had been strengthened and that the government was prepared to

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[1] The Press, Wednesday, 30 April 1969.

use that strength. Finally, it is interesting that although the list of S.I.S. names was declared to be inaccurate,[1] the government still chose to investigate. Significantly the person involved was a radical member of the Labour Party and obviously a critic of the Security Intelligence Service.

Conclusions are difficult to draw from this instance, but it does demonstrate that there is potential under the Act to harrass, or at least irritate, outspoken critics.

The second action taken under the Act was in May 1974. Once again the individual involved, Dr D. Sutherland, was an outspoken critic of the government, particularly the activities of the Justice and Police Departments, and was also a campaigner for the Auckland Committee on Racism and Discrimination. The action was taken when Attorney-General Martin Finlay learnt that Dr Sutherland had a confidential Cabinet paper. His house was searched and he was questioned by the police.[2] The police moved, not because the paper would be "prejudicial to the interests of the State", but because it was a Cabinet paper and its release jeopardised the doctrine of collective responsibility.

Once again the Act was used, at the discretion of the Attorney-General, in order to discover the source of a document and its whereabouts. In the case of Mr Boshier it was presumably to protect the S.I.S. and 'national

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[1] The Press, Wednesday, 30 April 1969.

[2] The Press, 27 May 1974.

security' while in the second, to defend the doctrine of Cabinet secrecy and collective responsibility. It may be coincidental, but on both occasions the individuals involved were what could be described as dissenters or certainly frequent critics of government activities and spokesmen for civil liberties.

Certainly, when the actions took place, prosecution did not occur, but in the words of Mr Littlewood, "it appears as if the Act is being used to silence a critic".[1] These examples are important in showing the potential of the Act as a discretionary political weapon, to be used in a social way against awkward critics, but are minor compared both in seriousness and consequence to the Sutch case of 1974-75 which resulted in a prosecution.

The Sutch Case

On the 27th of September 1974, a Wellington economist and former Secretary of Industries and Commerce, Dr William Sutch, was charged under the Official Secrets Act. The charge was that on or about April 18th and September 26th, at Wellington, for a purpose prejudicial to the safety or interests of the State, he obtained information which was calculated to be or might be or was intended to be directly or indirectly useful to an enemy.[2] In other words he was accused of spying.

The purpose here is not to rehearse the trial and

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[1] The Press, 27 May 1974.

[2] The New Zealand Herald, 28th September 1974.

assess the merits of the case (Dr Sutch was acquitted), but rather to see how the Act operates in a real situation. The case also involved the S.I.S., who collected the information that led to Dr Sutch's arrest and trial. The point is to demonstrate how the Act can be used in a social rather than legal way as a method of neutralising important people who are seen as being detrimental to the national security.

Dr Sutch was obviously seen, because of his actions, as such a threat, by the S.I.S. and more recently by Mr Muldoon. Why? The essence of the prosecution, S.I.S. and Mr Muldoon's case against Dr Sutch was that he had clandestine and suspicious meetings with members of the Soviet Embassy who were recognised as K.G.B. agents. Under section 4 of the Act this is deemed to be admissible evidence in court on a charge under section 3, under which Dr Sutch was charged.

The S.I.S. claimed to have observed these meetings between April 18th and September 26th, which in their view and the view of the Attorney-General, were sufficient to bring Dr Sutch to trial.[1] This point, along with several others, was made clear when a previously confidential part of the Powles Report on the S.I.S. was released in early February 1980.

The Report showed that the S.I.S. were primarily concerned with the possible communication of official secrets. After the first alleged meeting with the Russians,

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[1] The Press, February 1980.

enquiries were made about people with whom Dr Sutch was in contact and who might have access to classified information. The service, however, did not know who was providing Dr Sutch with government information, if indeed anybody was, but that there was no doubt he had, like many thousands of other current or retired senior civil servants, some indirect access to official information. This, coupled with the meetings, proved, at least to the service, and the Solicitor-General, that there was a case to be answered.[1] Obviously, in the minds of those responsible for security, Dr Sutch was seen as a danger to the national security as they perceived it.

The content of this information, if indeed any was obtained, was unknown to the service. There was also no evidence that any information had been communicated. Although the charge was laid under section 3, it was section 4 which made the communication with a Soviet agent admissible evidence, which the prosecution relied on to try to obtain a conviction.[2]

If, for instance, section 4 did not exist the S.I.S. would have had no evidence on which to base its allegations. Section 3 only deals with the actual offence of obtaining and communicating information. Under this section alone there would have been no case to answer.

The jury, however, did not accept the evidence of the service as 'proof' and returned a verdict of 'not

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[1] The Press, February 1980.

[2] The Press, Tuesday, 18 February 1975.

guilty'. The damage, however, was done. In the considered opinion of the service, Dr Sutch was guilty of espionage. Sections 3 and 4 allowed them and the government to exercise judgement on this threat or otherwise of an individual to the national security.

The Prime Minister has recently exercised his judgement again on the innocence or guilt of Dr Sutch and released more information about the case to back up his claims that Dr Sutch was "guilty as sin"[1] This 'new' information, however, added nothing to the evidence that had already been presented at the trial.

He has exercised the same discretion in the expulsion of the Soviet Ambassador, Sofinsky. No conclusive proof was offered in either case, yet the judgement still stands. No doubt if Dr Sutch was alive today (he died in 1975), he would still be considered a threat to the national interest. No-one can deny the government the right to hold these opinions, but the Official Secrets Act enables them to give vent to these fears in an effort to suppress or neutralise an individual that is regarded as a threat. This is where the danger of the Act lies. Its broad, ambiguous wording and all-encompassing powers makes arrest and conviction far easier than under any other Act, and can be used at the disrection of the government as a way of securing what they perceive as the national interest.

If the breadth of the Act and the power granted

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[1] The Press, 1 February 1980.

therein is wide then the definition of the national interest can be drawn as wide accordingly. The Act places a great deal of power in the hands of the government on trust. However the national interest is defined by those responsible for security (the government and the S.I.S.) the Official Secrets Act is the weapon instrumental in the discharge of that responsibility. Everything from definition to enforcement is at the discretion of the government.

This may be an extreme view, but the potential exists to suppress information, to harrass critics and to imprison dissenters. Secrecy and the Official Secrets Act can be turned against the democracy they were designed to protect.

Proposition three stated: "that the Official Secrets Act, by its existence and its operation, is undemocratic". The discussion above tends to confirm this assertion. Many of the clauses are unrelated or unique to normal peacetime legal codes. The Act, along with other methods, is an impediment to the free flow of information, which is necessary to public debate. This suggests that reform is needed. Reform of the Act alone, however, will not bring about a major transformation in the public debate.

It is, nevertheless, a beginning. As this thesis is concerned only with the Official Secrets Act, its consequences and implications to the overall practice of official secrecy, the discussion of reform in New Zealand

will be restricted to efforts devoted to reform of the Act. The first task, however, is to describe briefly how other nations have handled the vexing question of information in a democracy.

CHAPTER FIVE

THE REFORM OF OFFICIAL SECRECY: (1) THE OVERSEAS EXPERIENCE

The advocates of freedom of information and official secrets reform are fond of drawing attention to progress made in this area by other western democracies. New Zealand, they reason, is far behind with regard to open government.

The focus in this chapter will be on what advances have been hade overseas, and in particular what part the reform of secrecy legislation or the passage of Freedom of Information laws have had on the development of secrecy reform in general. The two nations that are mentioned most in freedom of information discussions are Sweden and the United States, who set up shining examples of open government.

THE UNITED STATES

Prior to 1966, when the Freedom of Information Act (FOIA) was passed, public access to documents held by the national executive was governed by a "need to know" policy deriving from the house-keeping statute of 1789, which prescribed regulations for the use and preservation of documents, and the Administrative Procedure Act of 1946, which indicated that official documents should be made

available to the public. This access could be restricted where release might damage the public interest.[1] Official secrecy, however, abounded and was accentuated by World War II and the Cold War. The situation changed, however, with the passage of the FOIA in 1966.

The process of reform was long and tortuous. Investigation and research, initiated by open government advocates from Congress, the press and legal circles,[2] took some eleven years in the House Special Sub-Committee on Government Information. The result was the FOIA. The executive branch of government, however, offered no assistance or encouragement and for a time the President's approval seemed uncertain.[3]

The FOIA, despite the intensive research, proved to be inadequate. It was not clear or well written. For political or legislative reasons there were cloudy legal phrases, the result being that it often created even more restrictions on access.[4] In 1971 the Act came under Congressional review where in sworn testimony, various government and private witnesses gave evidence.[5] Then in 1974 the FOIA was amended, although once again it did not receive executive endorsement, with President Ford attempting to veto the amendment.[6]

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[1]Harold C. Relyea "The Freedom of Information Act: Its Evolution and Operational Status," Journalism Quarterly, Vol. 54, p. 538.

[2]S.J. Archibald, "Working," Columbia Journalism Review, p. 54.

[3]Relyea, op cit., p. 359.

[4]Archibald, op cit., p. 538.

[5]Relyea, op cit., pp. 359-360.

[6]"National Security and the Amended Freedom of Inform-

These two Acts together involve three basic provisions for public access to information. The first requires departments to give notice of what their files contain, the second grants an individual right of access and a remedy if that right is refused, and the third describes the exempted information.[1] These provisions, generally unworkable before the second Act, are now being put into practice with encouraging results for American freedom of information campaigners. Generally, departments are efficient in meeting requests for files. There are still many difficulties, particularly with uncooperative departments, such as the F.B.I.[2] and the administration of the Act is extremely expensive (around $20 million per year).[3] However the Act is now a meaningful reality and is accepted and operated by most agencies.[4]

The two important points to note, however, in the obtaining of the goal of freedom of information are one, that the whole exercise took a great deal of time, effort and trial and error to find a successful formula. In fact 20 years elapsed from the instigation of research to the finished product. The second point is that the Acts were virtually forced upon the executive branch of government. The President and the bureaucracy showed little enthusiasm for reform.

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ation Act," Yale Law Journal, 85, 371 (1976), p. 401.

[1]Elias Clarke, "Holding Government Accountable: The Amended Freedom of Information Act," Yale Law Journal, 84, 741 (1975), p. 743.

[2]The Press, 31 May 1977.

[3]"Freedom of Information and Open Government," op cit., p. 57.

[4]Relyea, op cit., p. 544.

This is an important point for the prospects of legislative reform in New Zealand. The division of powers in the American system does not in reality exist in the New Zealand set up. With the domination of Parliament by Cabinet, it seems unlikely that any reforms could be forced through without executive approval, in the way that the FOIA was in the United States. It stands to reason then that any reform undertaken in New Zealand must be acceptable to Cabinet. Thus with official secrecy being such an integral part of executive and administrative government, the possibility of any substantial reform must seem remote.

SWEDEN

The freedom of access to official information in Sweden has a long history. In gaining power in 1766, one pary had promised to fight secrecy in public affairs. It kept this pledge by passing the Freedom of the Press Act. This gave the press the right to publish documents. However this Act did not give an implicit right to demand documents. It remains unexplained why the Swedish government took the second step of actually allowing access to official records.[1]

This Act was incorporated in another such Act in 1810 and finally reaffirmed in the latest piece of legislation, in 1949. It is now part of the Swedish constitu-

[1]Nils Herlite, "Publicity of Official Documents in Sweden," Public Law, Vol. (1958), p. 52.

tion. It states:

> To further free exchange of opinion and general enlightenment every Swedish citizen shall have free access to official documents in the manner specified below. This right shall be subject only to such restrictions as are required out of consideration for the security of the realm and its relations with foreigh powers or in connection with official activities for inspection, control or other supervision, or for the prevention and prosecution of crime or to protect the legimate economic interests of the state, communities and individuals or out of consideration for the maintenance of privacy, security of the person, decency and morality. 1

Further exceptions are made in the Secrecy Act 1937, which can set time limits on certain documents, depending on their content, before they are allowed to be released. For example, medical records have a 70 year restriction operating, while personal income tax returns have a limit of 20 years.[2]

This tradition of public access and publicity of documents makes every decision accessable. Also the authorities are under observation not only after a decision is taken, but also at the preparatory stage.[3] It would be beyond the scope of this thesis to go into detail with regard to the operation of the Swedish system. Suffice it to say that the Swedish citizen is afforded far greater access to government documents than in any other democracy. There are restrictions and there are cases where suppression occurs.[4] However the claim that the government in

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[1]Herlitz, op cit., p. 51.

[2]Neil Elder, Government in Sweden: The Executive at Work (Oxford : Pergamon Press, 1970), p. 152.

[3]Herlitz, op cit., p. 55

[4]Elder, op cit., p. 152.

Sweden is open and public is to a greater extent justified

One point that is important, however, is the constitutional structure of the Swedish government. It does have a Cabinet system, but the departments are relatively small and administration as such is carried out by Administrative Boards that are generally independent of Ministerial control.[1] Thus the doctrine of ministerial responsibility as operated under a Westminster style of government is not a characteristic of the Swedish system. The democratic control then that Parliament in New Zealand theoretically exercises over Ministers, does not exist in this form in Sweden. Control is ensured through access and publicity.

Therefore the Swedish system, like the American, differs somewhat from a Westminster style of government. However, this does not exclude the possibility of a Freedom of Information statute working in this country, particularly if one considers the apparent lack of control afforded New Zealand citizens through the largely outdated and mythical doctrine of ministerial responsibility.

Discussion and action concerning the freedom of information is not, of course, confined to these two countries alone. In Australia, an Interdepartmental Committee was set up to consider these issues in 1972 by the Labor Government, and it reported in 1976. The reforms advocated followed the lines of the American Acts, although

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[1] Freedom of Information, op cit., p. 7

the final say in what is to be released remained in the hands of the Minister. Also, no changes were mooted for the provision in the Crimes Act 1919, which prohibits unauthorised disclosure of any documents.[1]

Following on from this, the Commonwealth Government introduced a Freedom of Information Bill into the Senate in June 1978. The Bill's purpose is "to give members of the public rights of access to official documents". Said to be the first of its kind to be introduced by a government based on the Westminster tradition it has been referred to a select committee which is at present taking submissions.[2]

In Canada, also, some moves have been made to open government up. In 1973 the government released guidelines for departments, where any government paper or consultant report had to be produced to Parliament in response to a notice of motion. There were, as would be expected, a list of exemptions where the guidelines would not apply. As yet, however, these new measures have not been implemented.[3]

The Canadians have also enacted a Human Rights Bill which gives right of access to personal information held by the government, right to request correction of that information, and right to control the use of the information.[4]

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[1] Freedom of Information, op cit., p. 10.

[2] Committee on Official Information, Newsletter, No. 2, p. 5.

[3] Freedom of Information, op cit., p. 10.

[4] Freedom of Information and Open Government, op cit. p. 63.

These nations then, along with others such as Finland and Austria, have moved or are moving toward greater openness in government.

Another country which has recently been debated th merits of freedom of information, the United Kingdom, is perhaps the most important, as it may provide a lead and an example as to how reform may occur in this country Of course, what happens in New Zealand is not dictated by events in Britain, but how they handle the issue there is significant for New Zealand, as we not only derive our Official Secrets Act almost verbatim from the British legislation, but also because the British Privy Council i still the final court of appeal in the New Zealand legal system.

Attempts at reform in Britain, however, are not encouraging for reformers. The first real moves towards government action on freedom of information came in 1969 when a White Paper, "Information and the Public Interest" urged the continuance of the practice of releasing certai information.[1]

A year prior to this the Fulton Committee on the Civil Service noted there was "too much secrecy" in government and recommended the setting up of a committee to analyse this problem. This advice was followed and the Franks Committee was set up in 1972. It was not, as many suggest, convened as a result of The Sunday Telegraph case of 1971, which called section 2 of the Official

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[1]Freedom of Information and Open Government, op cit., p. 65.

Secrets Act into disrepute.[1] The case did, however, provide the terms of reference which were limited to investigation into the workings of section 2.[2]

The Committee concluded that:

> We found section 2 a mess. Its scope is enormously wide. Any law which impringes on the freedom of information in a democracy should be much more tightly drawn. A catch-all provision is saved from absurdity in operation by the sparing exercise of the Attorney-General's discretion to prosecute ... People are not sure what the section means or how it operates in practice or what kinds of action involve real risk of prosecution. 3

The Committee thus recommended that the law should be changed so that criminal sanctions are retained only to protect what is of real importance. Their suggestion for reform was repeal of section 2 (corresponding to section 6 in New Zealand) with the passage of an Official Information Act. This would apply to:

> (a) Classified information relating to defence, security, foreign relations, currency and resources
> (b) Law enforcement information.
> (c) Cabinet documents.
> (d) Private information. [4]

These proposals, although a step in the direction of open government, did not receive universal approval. One criticism was that by narrowing the scope, it made it less absurd for the government to use the Act to restrict matters within the reformed section's ambit, which were seen as being drawn too wide.[5]

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[1] Refer to the section on the press, Chapter Four, p where the judge in the case, Mr Justice Caulfield, suggested section 2 should be "pensioned off".

[2] Cmnd. 5104, op cit., p. 10.

[3] Ibid., p. 35.

[4] Ibid., p. 101.

[5] "Messing About with a Mess," op cit., p. 16.

Whatever the suggestions made by the Franks Committee, as yet none have lead to any reform of the Official Secrets Act. A new Bill was published in 1976 which not only embodied the Franks proposals but also removed the protection of criminal sanctions from Cabinet documents not dealing with national security and information relating to economic security.[1]

In 1979, after the change of government, a Protection of Information Bill, rather than a new Official Secrets Bill, was introduced to the House of Commons. It was designed, however, as Franks recommended, to replace section 2 of the old Act.[2] While the Bill was still before Parliament the Blunt spy scandal erupted in Britain, where the Queen's art adviser and former British agent was exposed as being a Russian agent, both before and after the war. The wide drafting of the new Bill would, if it had been enacted, have prevented these new facts from coming to light. At the same time The Times editorial came out against the Bill as being "a grave threat to the freedom of the press by restricting its ability to investigate and report on subjects of legitimate and often significant public concern".[3]

In the face of mounting opposition to the Bill, that would "substitute a number of new broad offences for the old one", the Bill was dropped. Thus nine years after Mr Justice Caulfield suggested section 2 should be

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[1] Freedom of Information and Open Government, op cit., p. 65.

[2] The Times, editorial, Wednesday, 14 November 1979, p. 13.

pensioned off[1] and eight years after Lord Franks made his recommendations, official secrecy legislation remains unchanged in Britain.

What then is the relevance of the overseas experience for reform in New Zealand? Apart from providing examples from which New Zealand reformers can draw to compile a blueprint for change, the experience demonstrate the process of reform, its pitfalls, obstacles and the possible way to success.

The discussion above raises several points. First that reform of legislation and through legislation takes a great deal of time. The Swedes have a good measure of open government because it has been traditional for 200 years for them to be so. The United States took 20 years to assemble a workable Freedom of Information Act. The Australians and British have been investigating the possibilities of reforms for almost a decade.

Secondly, that reform must be gradual and based on the realities of the present. Sudden reforms may alienate and lose the support of the bureaucracy, yet to be successful the reforms must be workable and contribute meaningfully to freedom of information.

Thirdly, for freedom of information to become a reality, the reform as far as possible must either not be undertaken by the executive (as secrecy is to their advantage) or that at least the executive arm of governmen

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[1]The summing up by Mr Justice Caulfield in The Sunday Telegraph case, quoted in Minogue, op cit., p. 217.

must be obliged to initiate meaningful reform. If citizens truly desire freedom of information so as to reinforce the public debate then those that are unfairly advantaged by official secrecy must be excluded from the reform process or at least compelled to reform their practices. Obviously the former cannot be the case in New Zealand, as it was in the United States. It is suggested then that the latter strategy would need to be employed. That is, those in power, the executive, must be compelled to bring about change. This chapter has in some measure verified proposition five, at least in the overseas experience. It stated: "that because the Act is undemocratic, and there is pressure for change, reform will occur".

The task of the next chapter is to describe the pressure for change in New Zealand and to see how this may or may not bring about reform in this country.

CHAPTER SIX

THE REFORM OF OFFICIAL SECRECY:

(2) NEW ZEALAND

> It is clear that uncontrolled official discretion is central to the disease (of secrecy) and that curtailment of that discretion must be part of any cure. When the law sanctifies unbridled executive discretion, or when its standards are ambiguous and loosely drawn, officials will feel justified in interpreting the law in a manner that conforms to their own political or bureaucratic interests. [1]

In returning to the original propostion concerning democratic ideals and secrecy, it can be reasoned that if freedom of information is an objective of a democratic society, then the present state of affairs must be changed.

Proposition three states "that the Official Secrects Act, by its existence and its operation, is undemocratic". It can be concluded from the discussion in Chapter Four that the New Zealand Act is, by its operation and by the nature of its intent, contradictory to the ideals of democratic theory. If there is to be change, the corollary of this is proposition four, which claimed "that reform is necessary to reconcile practice with democratic theory".

As the statement at the beginning of this chapter indicates, political discretion is sanctified by the Act and for true reform this discretion must be removed. Thus we turn to Proposition five, which states "that because the Act is undemocratic and there is pressure for

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[1] Halperin and Hoffman, op cit., p. 133.

change reform will occur".

The purpose of this chapter is to describe the pressure for reform, and the attempts past and present both to acknowledge that pressure and to change the Act. There is, however, one important preliminary point to be made in connection with reform in New Zealand. Although this thesis concentrates on the Official Secrets Act, its operation and reform, the Act as Chapters Two and Four show, is only one part of the whole scene.

Several other pressures and constraints operate in government, which are also important in the causation and continuation of secrecy. It is clear that mere legislation is not sufficient.[1] There must be a fundamental change in the attitudes and approach by government and civil servants to freedom of information, for the goals of reform minded critics to become a reality.

A hypothetical situation was described in Chapter One (page 19) which suggested how different groups may orient themselves towards the Act and its reform. The real circumstances tend to confirm those assertions.

It was proposed that the public may remain uninterested or unaware of the problem. Certainly the controversy has yet to attract much attention from the public in the way that, for instance, abortion, environmental and general political issues such as the economy and energy have.

The main thrust for refrom has come from interest groups such as the Committee for Freedom of Information,

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[1] Freedom of Information, op cit., p. 12.

the Council for Civil Liberties, and the Consumer and Environmental Councils.

It was also suggested that governments need to be forced into taking an interest in the problem. This pressure came firstly in the form of the Sutch trial which demonstrated to many the danger of the Act. Agitation began within the major parties after this incident, most noticeably in the National Party with Hamilton West M.P., Mike Minogue, adopting freedom of information as his primary goal.

It stands to reason that the assertion that public servants would remain unsympathetic to reform is valid as secrecy and confidential intercourse is so much a part of administrative practice. Finally, it would be logical to assume the opposition would use the promise of reform as a device to provide electoral support. In accordance with this both major parties have pledges to official secrecy reform in their 1978 Election Manifestoes.

These assumptions indicate that a certain state of affairs must exist in the political system for reform to occur. As Mike Minogue aptly puts it:

> To obtain the passage of freedom of information legislation in New Zealand we require a climate of public opinion which the establishment finds very difficult to resist. The nature of the establishment clearly is such that it cannot significantly reform itself. It therefore requires to have the necessity for reform thrust upon it by the force of a growing clearly expressed public concern. [1]

We turn then to the development of reform in New Zealand.

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[1]Michael Minogue, "Information and Power: Parliamentary Reform and the Right to Know," Politics in New Zealand: A reader, by S. Levine (ed.) (George Allen and Unwin : Sydney, 1978).

Previous Attempts and Promises

It could be argued that the year of 1921 saw, in a negative sense, the first reform of official secrecy. That is, the provisions (the 1920 U.K. Act) which would have strengthened the legislation and meant a retrograde step for the freedom of information, were rejected.

The second instance of 'reform' was in fact in 1951 when the existing legislation was substantially altered. It is fair to describe this as a reform as the government of the day saw a flaw in the present system (that is, lax security measures) and enacted legislation to remedy that situation. However, this change was not a 'reform' in terms of improving the democratic model. Although it aids the government in the carrying out of their task, it remains a hindrance to the fuller development of democratic ideals and because of the alterations in 1951 is in view of its antithesis to the theory even more in need of reform

The first attempt, however, at reform aimed at changing the Act so as to promote open government occurred in 1975. In the wake of the controversial Sutch case of February 1975, the Labour Government put forward proposals to replace the Official Secrets Act. The move was made by the Prime Minister, Mr Rowling, in March. The review would, he assured, be conducted in public, possibly by a Parliamentary Select Committee.[1] The main proponent of reform was Attorney-General Martyn Finlay. His view was that:

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[1] Christchurch Star, 11 March 1975.

> The Official Secrets Act in its existing state imposed a burden on society that was quite out of accord woth society's needs. 1

Further, he suggested "that the Act is too far-reaching and oppressive".[2]

Although Mr Rowling seemed anxious to encourage his Attorney-General, wishing "to see how quickly the law could be drafted",[3] Dr Finlay was more cautious emphasising that any reform while urgent should not be rushed.[4] However, the realities of the parliamentary calendar intervened and in June Dr Finlay announced that there would be no reform of the Act that year as there "just wasn't any room for new material".[5]

Predictably, freedom of information campaigners were disappointed, claiming that the government had "turned a complete about face on the Act" and urged them to give reform the highest priority.[6]

The Labour Government, however, did not get another opportunity to carry out the promise of reform as they lost power in November 1975. Nevertheless, Labour M.P. Richard Prebble, did attempt to bring about some legislative reform by introducing two private members Freedom of Information Bills, one in June 1977, and the other in June 1979..

The first Bill saw as its aim the fulfilment of New

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[1] The Press, 9 April 1975.
[2] The Press, 7 April 1975.
[3] The Press, 10 April 1975.
[4] Christchurch Star, 1 March 1975.
[5] The Press, June 1975.

Zealand's "political right to be informed by the government concerning the public business so that the people may participate more fully in the democratic process."[1] Although the National M.P. Mike Minogue can be described as the strongest advocate of freedom of information, he was not impressed with the Bill, calling it the product of an "intellectual virgin".[2] His argument, which is pertinent to understanding reform of secrecy, was that extreme caution was necessary and a great deal of time and effort must be spent on any attempt at reform.[3]

Mr Prebble's two Bills of 1977 and 1979 were directed at the overall problem of freedom of information and not the specific case of the Official Secrets Act. This point was noted by Attorney-General Jim McLay, who argued that there is a "need for freedom of information review to include not only the material in general terms that the member (Mr Prebble) is asking us to look at, but also a review of the Official Secrets Act and also to introduce means to ensure the privacy of the individual."[4]

As is the fate of the majority of Private Members Bills, both of Mr Prebbles's Freedom of Information Bills were rejected. However, during the debate concerning these Bills the National Government demonstrated that it too was prepared to take steps to reform official secrecy.

The first stage in the reform process has been the setting up of a committee to study the problem.

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[1] N.Z.P.D. 1977, May 19-June 16, Vol. 410, p. 498.
[2] Ibid., p. 500.
[3] Ibid., pp. 500-501.
[4] N.Z.P.D. 1979, Vol. p. 738.

The Danks Committee on Official Information

At the time of the Sutch arrest and trial in 1974 and 1975, not only did the Official Secrets Act come in for attention, but so too did the executors of that Act, the S.I.S. Accordingly, an enquiry was conducted into the service by the Chief Ombudsman, Sir Guy Powles, after certain allegations of misconduct were made against the service.

Apart from making numerous recommendations on the operation of the Service itself, Sir Guy criticised secrecy in government[1] and suggested that consideration be given to an examination of the principles and practices of classification of information for security purposes within government departments.[2]

This fairly specific recommendation with regard to security of information was eventually accepted by the National Government in 1978. The enquiry, however, was not to be confined to classification alone, with the Committee on Official Information being given very wide terms of reference. This can be seen when one looks at the British experience where three committees at various times have undertaken enquiries into particular aspects of security of information, the Younger Committee on Privacy, the Radcliffe enquiry into the release of Cabinet memoirs and most important, the Franks Committee on section 2 of the Official Secrets Act (1911).

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[1] Security Intelligence Service Report, op cit., pp. 72-73.

[2] Ibid., p. 35.

The terms of reference for the New Zealand Committee on Official Information, in one way or another, covers all of these aspects:

> 1. The basic task of the Committee is to contribute to the larger aim of freedom of information by considering the extent to which official information can be made readily available to the public. With this end in view and having in mind the need to safeguard national security, the public interest and individual privacy, the Committee should in particular:
>
> (a) review the criteria for applying the classification now in use and if necessary, recommend the redefinition of the categories of information which should be protected; and
>
> (b) examine the purpose and application of the Official Secrets Act 1951, in particular section C and any other relevant legislation, and recommend amending legislation.
>
> 2. In the light of the foregoing review the Committee should advance recommendations on changes in policies and procedures which would contribute to the aim of freedom of information. [1]

These terms of reference are extremely wide and it is not surprising that the Committee twice had to delay the completion date of their report.

It is perhaps pertinent here it note the difference between a Royal Commission and a Committee of Enquiry. Although it has been suggested that a Royal Commission is for major enquiries, and a Committee is a short-lived affair and has limited terms of reference, there is little support for this notion and the idea that the former are more prestigeous that the latter.[2]

Certainly the terms of reference of the Danks Committee could hardly be called limited, nor could its

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[1] Press Statement, Rt. Hon. R.D. Muldoon, 28 July 1978.

[2] Alan C. Simpson, "Commission of Enquiry and the Policy Process,"

work be described as being carried out in haste. The Committee met for the first time on 29 July 1978, and has recently indicated that several more months will be needed.[1]

Despite the hopes for refom that this Committee has engendered, it has not received universal approval. Apprehension was voiced at the 'weighting' of the Committee. Of the seven members, five are public servants. The Auckland District Law Society claimed that these servants are "being asked in effect to act as judges in their own cause".[2] The two members who are not civil servants are the Chairman, Sir Alan Danks, Chairman of the University Grants Committee and former Pro-Vice Chancellor of the University of Canterbury, and Professor K.J. Keith, Dean of Law at Victoria University of Wellington, who is on record as an advocate of the reform of the Official Secrets Act.[3] The civil servants are all long-serving administrators and heads of their respective departments.[4]

The Committee's terms of reference indicate that the investigation extends far beyond consideration of the Official Secrets Act, therefore it is unnecessary for the purposed of this thesis to go into detail with regard to the Committee's work concerning the overall question of freedom of information.

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[1] Christchurch Star, 18 February 1980, p. 3.

[2] The Press, 22 August 1979, p. 21.

[3] Keith, op cit., p. 516.

[4] The public servants on the Committee are: Messrs. E.A. Kennedy (Chairman, State Services Commission), replaced by his successor, Dr. R.M. Williams; P.G. Millen, Secretary to the Cabinet; G.S. Orr, Justice Department; F.H. Corner, Foreign Affairs; and J.F. Robertson, Defence Department.

There are two tasks, however, that can be undertaken. The first is to describe how the Committee is going about the enquiry. In this way it can be seen what the Committee is looking for and the direction it might be taking. Secondly, to look at what activities of the Committee relate to the Official Secrets Act. This objective, however, is hampered by the fact that Newsletter No. 4 was unavailable at the time of writing. It is understood that this letter was partially to cover the Committee's work with regard to the Act. An attempt to gain the newsletter directly from the Committee when it was released was unsuccessful as "they were not designed for general circulation". [1]

First, then, how is the Committee setting about its task? Upon the creation of the Committee, written submissions were invited from interested parties. These constitute the major source of material for the enquiry.[2] This is important as the Committee can be seen to be asking interested parties what they think should be done with regard to freedom of information. It may be more likely then that the final conclusions will be based on a measure of consensus of opinion among the interested parties.

The Commission recieved 129 submissions in all, 65 from outside the official sector, a further 36 from government departments, and 28 from statutory corporations and government agencies. The Committee is also taking

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[1] Letter to the author, from the Committee, 29 January, 1980.

[2] Newsletter No. 1, pp. 1-2.

[3] Newsletter No. 2, p. 2.

advantage of the considerable volume of published material concerning developments overseas.

The third and more general approach is in the form of a review of the scope of their enquiry and of the broad issues of principle it raises.[1] The Committee acknowledges that one of the strongest lines of argument is that the Official Secrets Act must be repealed or at least substantially revised and limited in application.[2] At the same time, however, they raise the point that where portection is justified, what will perform this task if the Act is repealed?[3]

Two approaches for change that have been highlighted by the submissions and overseas experience are through legislation or declaration of guidelines. The legislative approach would accord a staturory right of access to official information. One of the main arguments for this is that nothing less will induce real change.[4] This approach requires some amendment to the Act. The objections raised, however, include the notion that "mischief without responsiblity" could be promoted and it would "be costly, and inhibit the free flow of ideals within official circles".[5] Also, this method, as with any other, has the mandatory requirment of listing the statutory exemptions from disclosure, such as defence, foreign relations, intelligence, Cabinet material, law enforcement and economic and private

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[1] Newsletter No. 1, p. 2

[2] Annex to Newsletter No. 2, p. 6.

[3] Newsletter No. 3, p. 9.

[4] Annex to Newsletter No. 2, op cit., p. 2.

[5] Ibid., p. 3.

information. Questions are raised, however, as to where the protective line should be drawn.[1]

The declaratory approach would again involve some amendment to the Official Secrets Act, where guidelines or directions from government or a formalised code, perhaps endorced by Parliament or sanctioned by legislation, would provide the basis for the release of certain information, and the protection of exempted documents along similar lines to that in the legislative proposal.[2]

These investigations then, along with the more general study of how best to bring about a workable system of freedom of information, are the major occupations of the Committee. Their task is indeed immense. What conclusions they will come to as regard to the terms of reference are as yet unknown, not only to the outside observer but perhaps to the Committee members themselves.

What then does the Committee, its existence, composition and operation, tell us about prospects for reform of the Official Secrets Act? The first point is that some efforts <u>are</u> being made towards the cause of reform. Change will not occur instantly as some submissions raise the point that a transformation in attitude in the State Services and society generally is needed, and this can only come over a period of time.[3]

Also, some doubts have been raised as to the composition of the Committee and how this may inhibit a bal-

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[1] Annex to Newsletter No. 2, <u>op cit</u>., p. 4.

[2] Ibid., p. 3.

[3] Ibid.

anced approach. These doubts can only be answered when the report is completed and published. The greatest question mark over the Committee's efforts in general and the reform of the Act in particular is how will the Government react to any proposals? The statement at the beginning of this chapter suggested that the discretion over what should and should not be released must be taken out of the hands of the executive.

However, in the New Zealand system the responsibility for reform in reality rests with the executive. It is questionable then whether any reform instituted by the Government will move very far in the direction of taking these powers out of the hands of the executive. The option of implementing any of the Danks Committee proposals will remain with the Government. This is perhaps where the value of the Committee lies. If, for instance, the Committee proposed major changes to the Act, this may stimulate pressures either from within the Government or from pressure groups, the press, or the public in general, which may force the Government, whatever it may be, to take meaningful action in the direction of Official Secrets Act reform.

In the end, pressure for change must come from those most vitally interested in policy procedures and outcomes. These people could generally be termed 'educated; citizens, members of interested groups, university personnel and inquisitive, politically aware individuals, most of whom are able to analyse and understand technical and complex information about policy alternatives - a prerequisite to active participation in goverment. Issues of the day are

often argued more coherently and with greater ferocity by interest groups and the government, rather than in Parliament. These include such questions as ecology, native forest use and the environment in general, consumer affairs and energy, where interest groups, that are vociferous and articulate, exert a great deal of pressure on the government.

Information is not only seen as necessary to the question but as a right, an entitlement to know what the government is doing. The isses are vital, public pressure is helpful in deciding an issue in the public interest, and information is the commodity that enables the process to continue. This process is in many ways democracy at work, yet it can be effectively blocked by government refusals to allow the necessary information on policy choices and outcomes to be made available.

Thus this important information and access to it becomes a measure of how democratic a society's policy-making processes are.[1] If information is blocked to interested parties, then their educated and articulate leaders are likely to lead the thrust for reform of the system. This is perhaps happening already, although the group of people who consistently voice objections to the secrecy system and the Act, is small. Sustained and relevant criticisms, and sensible alternatives are as yet generlly absent from the political debate.

When this ceases to be the case, however, perhaps a government may find it impossible to resist the forces for reform.

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[1] K. Ovenden, The Politics of Steel (London : Macmillan, 1978), p. 195.

CHAPTER SEVEN

CONCLUSIONS

Why is the Official Secrets Act regarded as undemocratic, and what attempts are being made to change the situation?

A satisfactory solution to this problem, which is the central aim of this thesis, requires a full discussion of the importance of information in a democracy, the significance of the Official Secrets Act in the secrecy system and a description of the process of reform. What then were the findings with regard to the problem above?

Information in the public arena will stimulate a livelier debate, and encourage discussion and criticism of the activities of government. Healthy debate means a healthy democracy. Informed and accurate debate then, along with public participation in the business of government, improves efficiency and helps enforce limitation and control. As the democratic model was conceived in order to ensure public control of government, the extent to which information is available to the public can be seen as a measure of the commitment to the democratic ideal.

Politicians that are not commited to democracy may be removed by the ultimate sanction of the people, the vote. Although information may not be so important in

the act of choosing representatives, it can be useful in exposing unsuitable or unscrupulous politicians.

Official secrecy however is a system or practice which abrogates these methods of democratic control because it inhibits the flow of information to the public. The traditional arguments for official secrecy lie deeply rooted in the constitutional structure of the New Zealand system. To understand these is to also understand the existence and intent of the Official Secrets Act.

The twin doctrines of collective and ministerial responsibility are major justifications forwarded to defend the continuance of official secrecy. Collective responsibility requires cabinet secrecy, while individual responsibility has been linked to the arguments for bureaucratic secrecy. This link however is tenuous as a civil servant's actions, unbiased or partisan, open or secret, are the ultimate responsibility of the Minister who, in turn is responsible to cabinet and through cabinet to Parliament.

Separate arguments for the maintainence of secrecy in administration include the importance of candour in discussions between servants and with the Minister. It is argued that without this freedom of discussion, advice and argument would be less than full and frank. Secrecy it is suggested, will improve efficiency by ensuring privacy. However it could also be argued that if public servants were exposed to public

scrutiny, proposals and advice would be more carefully thought out and researched.

Further to the constitutional arguments, official secrecy is justified to a certain extent by the content of the information. Generally accepted catagories of, national security, diplomatic affairs, economic information, law enforcement information, details of contracts in negotiation and private information are areas that most agree, need some measure of protection.

Protection at present is seen to be provided by the Official Secrets Act. The New Zealand Act is derived from United Kingdom legislation. The development and origins of these Acts are important in understanding the present form of the New Zealand legislation.

The first two British Acts of 1889 and 1911 were drafted in vague terms and granted the government wide powers. However they received little debate and seem to have been generally accepted at the time as being concerned primarily with the problem of espionage. Despite this acceptance it is evident that the 1911 Act was also designed to restrict to a greater extent, public access to government information.

The 1920 Act granted further powers, and more specifically, was designed to make arrest and conviction of spies easier. Unlike the 1911 Act the 1920 Act did not apply to New Zealand as the House of Representatives rejected the Bill in 1921.

Nevertheless in 1951 the New Zealand House passed their own Official Secrets Legislation. Every section of

substance was drawn from the British Acts. The result was legislation more oppressive than had existed in New Zealand prior to 1951, as it included many of the provisions of the rejected 1920 Act and failed to take full account of the British Official Secrets Amendment of 1939.

The Act, passed at the very end of the session of 1951 was accorded very little debate, both in Parliament and amongst the public at large.

Several provisions were contradictory to traditional law. One placed the burden of proof on the defendant, another made actions preparatory to an offence an offence in itself, while another allowed certain evidence to be brought in a case that in normal circumstances would be inadmissable.

One of the main defences of the Act is that it is so wide and ridiculous to ever be used in an oppressive manner. However this is based on the assumption that governments are to be trusted with discretion in the application of the Act. Thus the Act by it's existance has potential to be used as a discretionary political weapon in the interests of a government, to silence and harass dissenters and critics.

This situation suggests that reform is needed. Changes in this country however are lagging far behind the progress acheived in some overseas countries. The two most notable examples of success in reform of secrecy and development of freedom of information are the United States and Sweden. These two nations also provide warnings for would-be reformers in New Zealand.

First the exercise takes a considerable amount of

time. In Sweden, access to government documents is a tradition developed and improved since 1766. The United States too has a similar tradition, but real progress towards greater access took 19 years of intensive study and research before workable Freedom of Information legislation was developed.

The second cautionary note is that for reform to be effective, the executive needs to be either excluded from the proccess as in America, or have the need impressed upon them for greater access to information. The Second United States Act was forced through in 1974 despite President Ford's veto.

These difficulties outlined above, surface again in the New Zealand attempts at reform. The practice of secrecy suits the purpose of a government, as they are able to shield themselves from undue embarassment and criticism. Therefore any attempt at significantly altering this situation is unlikely to have the sympathy of the executive. Cabinet dominates the legislature and can, if so inclined block any moves to reform official secrecy and the Official Secrets Act.

Attempts at change in New Zealand in the past have been weak. Following the trial of Dr Sutch in 1975 the Labour government promised to reform the Act. Despite the disdain that the government and the Attorney-General Dr Finlay obviously had for the Act, the proposal for reform in 1975 was discarded because of lack of Parliamentary time.

Auckland Central M.P., Richard Prebble attempted to get freedom of information legislation passed when he sponsored two Private Members Bills in 1977 and 1979. Neither of these were concerned with actual reform of the Official Secrets Act, which is seen as the first step in any reform designed to promote freedom of information.

The main prospect for reform in New Zealand comes with the Danks Committee on Official Information. The Committee has wide terms of reference, with the specific tasks of making recommendations for reform of the Official Secrets Act, and of the criteria for the classification of information, with a view to the general aim of greater freedom of information.

The Committee however has been criticised as being unbalanced, with five of the seven members being senior public servants. These men it is suggested are being asked to make a judgement in their own cause.

The importance of the Danks Committee however, can only be fully measured by the content and recommendations of their report, as yet incomplete, and the actions, if any, that the government takes on these recommendations.

Whatever the outcome of the Committee, there still remains a rising expectation, particularly among the educated and interested members of society, that we, as citizens are entitled to know what our government is doing. As yet this expectation does not represent the overwhelming or sustained pressure that is necessary to force a government into action.

The Propositions.

The observations above enable conclusions to be drawn

as to the validity of the five original propositions. They were:

1. "That democratic theory regards information as important in a political system." In view of the discussion above and in chapter one, this proposition is certainly valid. Basic freedoms in a democracy are often proclaimed. However the protection and full appreciation of those freedoms depend to a great extent on accessable and accurate information.

2. "That official secrecy is in some senses, contradictory to this theory." In essense this proposition is true, but there are many justifications for secrecy that cannot be dismissed lightly. The major problem in this respect is that there are no firm definitions between what should be secret, and what should not.

3. "That the Official Secrets Act by it's existance and operation, is undemocratic." The suggestion offered by this proposition is certainly valid. Although the Act is legal, it remains undemocratic. It is a major block to the freedom of information, and it's form and intent is contrary to traditional law and a citizens basic rights. The Act seems to refute the idea that democratic governments are obliged to treat people under their control, with fairness and equity. The Act could usurp this obligation and be used as a political weapon.

4. "That reform is necessary to reconcile practice with democratic theory." This is a self-evident proposition which serves to demonstrate the difficulties involved in reform. Changes take time and they are not always success-

-ful because of incomplete research or non-compliance by the executive branch of government.

5. "That because the Act is undemocratic and there is pressure for change, reform will occur." This is an assumption that can only be answered accuratly in the future. Reform has occured overseas, but in view of the problems in initiating effective reform, it remains to be seen if significant change will occur in New Zealand.

However, if we suppose reform does come about, what impact would it have?

Towards Freedom of Information

What contribution would a greater degree of freedom of information make to the fulfilment of the democratic ideal? One of the assumptions that the democratic model is based on is that governments are inherently untrustworthy and therefore they must be limited and controlled. This control is acheived through the ballot box, through the courts and through public debate and criticism of the government. Greater freedom of information would reinforce these methods of control. Criticism and lively and accurate debate about government activities help ensure that the administration is efficient, alert and receptive to public opinion.

However reform is difficult. Apart from the political and institutional impediments, there are several possible disadvantages or difficulties that may result from greater freedom of information. Purely mechanical illeffects are the high cost of making information available and the

logistical problems of organising and managing large quantities of information so that they can be made available.

There is also the problem of protecting secrets or sensitive information, which, if disclosed, would damage the national interest. This information must have adequate legal protection. So too must the private affairs of citizens remain confidential. The problem here is perhaps, one of definition. What is private and secret, and what is public and open?

Greater scrutiny, criticism and debate may enhance public control of government, but it may also serve to hinder and harass administration of government. Discussion may become less free and frank and bureaucrats could become timid in their policy advice.

Surely the question here is one of compromise. There must be a movement to more open government, but the position of those in government must be respected.

Whatever the path to freedom of information, the result is the most important. As it stands, the secrecy system is undemocratic. Freedom of information is necessary to the good health of democracy. The contradiction between secrecy and democratic theory needs to be removed. Whether or not this comes about, is the responsibility, not so much of the government, but of interested and concerned citizens.

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OFFICIAL SECRETS

INDEX

In this index "(n)" after a page number indicates that the enactment is referred to in a note on that page.

ANALYSIS

THE OFFICIAL SECRETS ACT 1951

1951, No. 77

An Act to make better provision in respect of official secrets [*6 December 1951*

1. Short Title—This Act may be cited as the Official Secrets Act 1951.

2. Interpretation—In this Act, unless the context otherwise requires,—

"Document" includes a part of a document:

["Commissioned officer of Police"] includes any commissioned officer of the Police Force of New Zealand; and also includes any person upon whom the powers of [a commissioned officer of Police] are for the purposes of this Act conferred by the Governor-General by Order in Council:

"Model" includes a design, pattern, or specimen:

"Munitions of war" means any thing, material, or device, whether actual or proposed, intended or adapted for use in war, or capable of being adapted for use in war; and, for the purposes of this definition (without prejudice to its generality), the expression "use in war" includes use in the production of munitions of war, and the expression "thing, material, or device" includes the whole or any part of any arms, ammunition, missile, implement, ship, vessel, aircraft, vehicle, tank, mine, engine, machinery, apparatus, or naval, military, or air force stores:

"Office under His Majesty" includes any office or employment under the Government of New Zealand; and also includes any office or employment on, in, or under any board, commission, corporation, or body that is an agent of His Majesty or an instrument of the Executive Government of New Zealand:

"Prohibited place" means—

(a) Any work of defence belonging to or occupied or used by or on behalf of His Majesty or the Government of any other country, including arsenals, naval, military, or air force establishments or stations, factories, dockyards, camps, ships, vessels, and aircraft; and also including telegraph, telephone, wireless, or signal stations or offices; and also including places used for the purpose of building, repairing, making, or storing any munitions of war or any sketches, plans, models, or documents relating thereto, or for the purpose of getting any metals, oil, or minerals of use in time of war:

(b) Any place where any munitions of war, or any sketches, plans, models, or documents relating thereto are being made, repaired, gotten, or stored under contract with the Government of New Zealand or of any other country or with any person on behalf of any such Government, or otherwise on behalf of any such Government:

(c) Any place which is for the time being declared by the Governor-General by Order in Council to be a prohibited place for the purposes of this Act:

"Sketch" includes any mode of representing any place or thing, whether by photography or otherwise, and in particular includes a map:

Any reference to His Majesty means His Majesty in right of New Zealand:

Any reference to a place belonging to His Majesty includes a place belonging to any Department of the Government of New Zealand or to any board, commission, corporation, or body that is an agent of His Majesty or an instrument of the Executive Government of New Zealand, whether the place is or is not actually vested in His Majesty:

Expressions referring to communicating or receiving include any communicating or receiving, whether in whole or in part, and whether the sketch, plan, model, article, note, document, or information itself or the substance, effect, or description thereof only is communicated or received; expressions referring to obtaining or retaining any sketch, plan, model, article, note, or document include copying or causing to be copied the whole or any part thereof (whether by photography or otherwise); and expressions referring to the communication of any sketch, plan, model, article, note, or document include the transfer or transmission thereof.

Cf. Official Secrets Act 1911, ss. 3, 12 (U.K.); Official Secrets Act 1920, ss. 9 (2), 10 (U.K.)

"Commissioned officer of Police": The references to a commissioned officer of Police were substituted for references to an Inspector of Police by s. 5 (2) of the Police Force Act 1947 (as substituted by s. 2 (1) of the Police Force Amendment Act 1956).

3. Spying—(1) If any person for any purpose prejudicial to the safety or interests of the State—

(a) Approaches, inspects, passes over, or is in the neighbourhood of, or enters any prohibited place; or

(b) Makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy; or

(c) Obtains, collects, records, or publishes, or communicates to any other person any secret official code word or password, or any sketch, plan, model, article, or note, or other document or information which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy,—

he commits an offence against this Act and shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years, or, in the case of a company or corporation, to a fine not exceeding five thousand pounds.

(2) Any person charged with an offence against this section may, if the circumstances warrant such a finding, be found guilty of any other offence against this Act.

Cf. Official Secrets Act 1911, s. 1 (1) (U.K.)

4. Communications with foreign agents to be evidence of certain offences—(1) In any proceedings against a person for an offence against section three of this Act, the fact that he has been in communication with, or attempted to communicate with, a foreign agent, whether within or outside New Zealand, shall be evidence that he has, for a purpose prejudicial to the safety or interests of the State, obtained or attempted to obtain information which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy.

(2) For the purposes of this section, but without prejudice to the generality of the foregoing provision,—

(a) A person shall, unless he proves the contrary, be deemed to have been in communication with a foreign agent if—

(i) He has, either within or outside New Zealand, visited the address of a foreign agent or consorted or associated with a foreign agent; or

(ii) Either within or outside New Zealand, the name or address of or any other information regarding a foreign agent has been found in his possession, or has been supplied by him to any other person, or has been obtained by him from any other person:

(b) The expression "foreign agent" includes any person who is or has been or is reasonably suspected of being or having been employed by a foreign Power, either directly or indirectly, for the purpose of committing an act, either within or outside New Zealand, prejudicial to the safety or interests of the State, or who has or is reasonably suspected of having, either within or outside New Zealand, committed or attempted to commit such an act in the interests of a foreign Power:

(c) Any address, whether within or outside New Zealand, reasonably suspected of being an address used for the receipt of communications intended for a foreign agent, or any address at which a foreign agent resides, or to which he resorts for the purpose of giving or receiving communications, or at which he carries on any business, shall be deemed to be the address

of a foreign agent, and communications addressed to such an address shall be deemed to be communications with a foreign agent.

Cf. Official Secrets Act 1920, s. 2 (U.K.)

5. Unlawful use of uniforms, forgery, personation, false documents, etc.—(1) If any person, for the purpose of gaining admission, or of assisting any other person to gain admission, to a prohibited place, or for any other purpose prejudicial to the safety or interests of the State,—

(a) Uses or wears any naval, military, air force, police, or other official uniform, whether of New Zealand or of any other country, or any uniform so nearly resembling the same as to be calculated to deceive, or falsely represents himself to be a person who is or has been entitled to use or wear any such uniform; or

(b) Orally, or in writing in any declaration or application, or in any document signed by him or on his behalf, knowingly makes or connives at the making of any false statement or any omission; or

(c) Forges, alters, or tampers with any passport or any naval, military, air force, police, or official pass, permit, certificate, licence, or other document of a similar character, whether of New Zealand or of any other country (in this section referred to as an official document), or uses or has in his possession any forged, altered, or irregular official document; or

(d) Personates or falsely represents himself to be a person holding, or in the employment of a person holding, office under His Majesty or under the Government of any country other than New Zealand, or to be or not to be a person to whom an official document or a secret official code word or password, whether of New Zealand or of any other country, has been duly issued or communicated, or, with intent to obtain an official document or any such secret official code word or password, whether for himself or for any other person, knowingly makes any false statement; or

(e) Uses, or has in his possession or under his control any official die, seal, or stamp, whether of New Zealand or of any other country, or any die, seal, or stamp so nearly representing any such official die, seal, or stamp as to be calculated to deceive, or counterfeits

any such official die, seal, or stamp, or uses or has in his possession or under his control any such counterfeited die, seal, or stamp,—

he commits an offence against this Act.

(2) If any person—

(a) Retains for any purpose prejudicial to the safety or interests of the State any official document, whether or not completed or issued for use, when he has no right to retain it or when it is contrary to his duty to retain it, or fails to comply with any directions issued by lawful authority with regard to the return or disposal thereof; or

(b) Allows any other person to have possession of any official document issued for his use alone, or communicates any such secret official code word or password as aforesaid so issued, or has in his possession any official document or any such secret official code word or password issued for the use of some person other than himself, or, on obtaining possession of any official document, whether by finding or otherwise, neglects or fails to restore it to the person or authority by whom or for whose use it was issued, or to a constable; or

(c) Manufactures or sells, or has in his possession for sale, any such die, seal, or stamp, as aforesaid,—

he commits an offence against this Act.

Cf. Official Secrets Act 1920, s. 1 (U.K.)

6. Wrongful communication of information—(1) If any person, having in his possession or control any secret official code word or password, whether of New Zealand or of any other country, or any sketch, plan, model, article, note, document, or information which relates to or is used in a prohibited place or anything in a prohibited place, or which has been made or obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding office under His Majesty or under the Government of any other country, or which he has obtained or to which he has had access owing to his position as a person who holds or has held such an office, or as a person who holds or has held a contract made on behalf of His Majesty or on behalf of the Government of any other country, or a contract the performance of which in whole or in part is carried out in a prohibited place, or as a person who is or has been employed under a person who holds or has held such an office or contract,—

(a) Communicates the code word, password, sketch, plan, model, article, note, document, or information to any person, other than a person to whom he is authorised to communicate it or a person to whom it is in the interest of the State his duty to communicate it; or

(b) Uses the information in his possession in any manner, or for any purpose, prejudicial to the safety or interests of the State; or

(c) Retains the sketch, plan, model, article, note, or document in his possession or control when he has no right to retain it or when it is contrary to his duty to retain it, or fails to comply with any directions issued by lawful authority with regard to the return or disposal thereof; or

(d) Fails to take reasonable care of, or so conducts himself as to endanger the safety of, the sketch, plan, model, article, note, document, secret official code word or password, or information—

he commits an offence against this Act.

(2) If any person, having in his possession or control any sketch, plan, model, article, note, document, or information which relates to munitions of war, whether of New Zealand or of any other country, communicates it, directly or indirectly, to any person in any manner, or for any purpose, prejudicial to the safety or interests of the State, he commits an offence against this Act.

(3) If any person receives any secret official code word or password, or any sketch, plan, model, article, note, document, or information knowing or having reasonable ground to believe, at the time when he receives it, that the code word, password, sketch, plan, model, article, note, document, or information is communicated to him in contravention of this Act, he shall be guilty of an offence against this Act, unless he proves that the communication to him of the code word, password, sketch, plan, model, article, note, document, or information was contrary to his desire.

Cf. Official Secrets Act 1911, s. 2 (U.K.)

7. Proof of purpose prejudicial to safety or interests of State—On a prosecution under this Act, if, from the circumstances of the case, or the conduct of the accused person, or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the State, it shall be deemed that his purpose was such a purpose unless

the contrary is proved, whether or not any particular act tending to show such a purpose is proved against him; and if any sketch, plan, model, article, note, document, or information relating to or used in any prohibited place, or anything in a prohibited place, or any secret official code word or password is made, obtained, collected, recorded, published, or communicated by any person other than a person acting under lawful authority, it shall be deemed to have been made, obtained, collected, recorded, published, or communicated for a purpose prejudicial to the safety or interests of the State unless the contrary is proved.

Cf. Official Secrets Act 1911, s. 1 (2) (U.K.)

8. Interfering with police or persons on guard—Every person commits an offence against this Act who, in the vicinity of any prohibited place, obstructs, knowingly misleads, or otherwise interferes with or impedes—

(a) Any constable; or

(b) Any person engaged on guard, sentry, patrol, or other similar duty in relation to the prohibited place.

Cf. Official Secrets Act 1920, s. 3 (U.K.)

9. Harbouring spies—If any person—

(a) Knowingly harbours any person whom he knows, or has reasonable grounds for supposing, to be a person who is about to commit or who has committed an offence against this Act, or knowingly permits to meet or assemble in any premises in his occupation or under his control any such persons; or

(b) Having harboured any such person, or permitted to meet or assemble in any premises in his occupation or under his control any such persons, wilfully omits or refuses to disclose to [a commissioned officer of Police] any information which it is in his power to give in relation to any such person,—

he commits an offence against this Act.

Cf. Official Secrets Act 1911, s. 7 (U.K.)

In para. (b) the reference to a commissioned officer of Police was substituted for a reference to an Inspector of Police by s. 5 (2) of the Police Force Act 1947 (as substituted by s. 2 (1) of the Police Force Amendment Act 1956).

10. Attempts, incitements, etc.—Every person who attempts to commit an offence against this Act, or solicits or incites or endeavours to persuade another person to commit an offence against this Act, or aids or abets or does any act preparatory

to the commission of an offence against this Act, shall be deemed to have committed that offence.

Cf. Official Secrets Act 1920, s. 7 (U.K.)

11. Duty of giving information as to offences—(1) Where the Commissioner of Police is satisfied that there is reasonable ground for suspecting that an offence against this Act has been committed and for believing that any person is able to furnish information as to the offence or suspected offence, he may apply to the Attorney-General for permission to exercise the powers conferred by this subsection and, if permission is granted, he may authorise [a commissioned officer of Police] to require the person believed to be able to furnish information to give any information in his power relating to the offence or suspected offence, and, if so required and on tender of his reasonable expenses, to attend at such reasonable time and place as may be specified by [the commissioned officer of Police]; and if a person required in pursuance of such an authorisation to give information, or to attend as aforesaid, fails to comply with any such requirement or knowingly gives false information, he commits an offence against this Act.

(2) Where the Commissioner of Police has reasonable grounds to believe that the case is one of great emergency and that in the interest of the State immediate action is necessary, he may exercise the powers conferred by the last preceding subsection without applying for or being granted the permission of the Attorney-General, but if he does so he shall forthwith report the circumstances to the Attorney-General.

Cf. Official Secrets Act 1920, s. 6 (U.K.); Official Secrets Act 1939, s. 1 (U.K.)

In subs. (1) the references to a commissioned officer of Police were substituted for references to an Inspector of Police by s. 5 (2) of the Police Force Act 1947 (as substituted by s. 2 (1) of the Police Force Amendment Act 1956).

12. Power to arrest—Any person who is found committing an offence against this Act, or who is reasonably suspected of having committed or of having attempted to commit or of being about to commit such an offence, may be arrested without warrant.

Cf. Official Secrets Act 1911, s. 6 (U.K.)

13. Search warrants—(1) If a Justice of the Peace is satisfied on oath that there is reasonable ground for suspecting that an offence against this Act has been or is about to be committed, he may grant a search warrant authorising any constable

named therein to enter at any time any premises or place specified in the warrant, by force if necessary, and to search the premises or place and every person found therein, and to seize any sketch, plan, model, article, note, or document, or anything of a like nature, or anything which is evidence of an offence against this Act having been or being about to be committed, which he may find on the premises or place or on any such person, and with regard to or in connection with which he has reasonable ground for suspecting that an offence against this Act has been or is about to be committed.

(2) Where it appears to [a commissioned officer of Police] that the case is one of great emergency and that in the interest of the State immediate action is necessary, he may by a written order signed by him give to any constable the like authority as may be given by the warrant of a Justice under this section.

Cf. Official Secrets Act 1911, s. 9 (U.K.)

In subs. (2) the reference to a commissioned officer of Police was substituted for a reference to an Inspector of Police by s. 5 (2) of the Police Force Act 1947 (as substituted by s. 2 (1) of the Police Force Amendment Act 1956).

14. Restriction on prosecution—A prosecution for an offence against this Act shall not be instituted except by or with the consent of the Attorney-General:

Provided that a person charged with any such offence may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody or on bail, notwithstanding that the consent of the Attorney-General to the institution of a prosecution for the offence has not been obtained, but no further or other proceedings shall be taken until that consent has been obtained.

Cf. Official Secrets Act 1911, s. 8 (U.K.)

15. Trial and punishment of offences—(1) Every person who commits an offence against this Act for which no other punishment is provided shall be liable—

(a) On conviction on indictment to imprisonment for a term not exceeding seven years or to a fine not exceeding five hundred pounds, or to both, or, in the case of a company or corporation, to a fine not exceeding three thousand pounds; or

(b) On summary conviction to imprisonment for a term not exceeding twelve months or to a fine not exceeding two hundred pounds, or to both, or, in the case of a company or corporation, to a fine not exceeding one thousand pounds:

Provided that no offence shall be dealt with summarily except with the consent of the Attorney-General.

(2) For the purposes of the trial of any person for an offence against this Act the offence shall be deemed to have been committed either at the place in which it actually was committed or at any place within New Zealand in which the offender may be found.

(3) In addition to and without prejudice to any powers which a Court may possess to order the exclusion of the public from any proceedings, if, in the course of proceedings before a Court against any person for an offence against this Act or the proceedings on appeal, application is made by the prosecution, on the ground that the publication of any evidence to be given or of any statement to be made in the course of the proceedings would be prejudicial to the safety or interests of the State, that all or any portion of the public should be excluded during any part of the hearing, the Court may make an order to that effect, but the passing of sentence shall in any case take place in public.

(4) Where the person guilty of an offence against this Act is a company or corporation, every director and officer of the company or corporation shall be guilty of the like offence unless he proves that the act or omission constituting the offence took place without his knowledge or consent.

Cf. Official Secrets Act 1920, s. 8 (U.K.)

16. **Extent of Act**—(1) This Act shall apply to every act or omission constituting an offence against this Act if it is done or made by any person in any part of New Zealand.

(2) This Act shall apply to every act or omission constituting an offence against this Act if it is done or made outside New Zealand in any of the following cases:

(a) Where the offender at the time of the act or omission was a New Zealand citizen or a New Zealand protected person within the meaning of the British Nationality and New Zealand Citizenship Act 1948, or a person holding office under His Majesty or owing allegiance to His Majesty:

(b) Where any code word, password, sketch, plan, model, article, note, document, information, or other thing whatsoever in respect of which the offender is charged was obtained by him, or depends upon information obtained by him, while he was in New Zealand, or while he was a New Zealand citizen, or

a New Zealand protected person, or a person holding office under His Majesty or owing allegiance to His Majesty.

Cf. Official Secrets Act 1911, s. 10 (1) (U.K.); Official Secrets Act 1939, s. 12A (Canada)

17. Application of Act to island territories and Western Samoa—(1) This Act shall be in force in the Cook Islands, the Tokelau Islands, and Western Samoa.

(2) *Repealed by s. 45 (1) of the Samoa Amendment Act 1957.*

(3) In this Act, except in this section, both in New Zealand and in the Cook Islands, the Tokelau Islands, and Western Samoa, the term "New Zealand" shall be construed as including the Cook Islands, the Tokelau Islands, and Western Samoa, and every reference to the Government of New Zealand shall be construed as including the Government of the Cook Islands, the Government of the Tokelau Islands, and the Government of Western Samoa.

(4) All criminal jurisdiction conferred by this Act may be exercised by the High Court of the Cook Islands in the ordinary course of its criminal jurisdiction, or by the High Court of Western Samoa in the ordinary course of its criminal jurisdiction. For the purposes of this subsection, paragraph (a) of subsection one of section fifteen of this Act shall apply as if the words "on indictment" were omitted, and paragraph (b) of that subsection and the proviso to that subsection shall not apply.

(5) In the application of this Act to the Cook Islands, other than Niue,—

(a) Every reference to the Governor-General or to the Attorney-General shall be construed as including the Resident Commissioner of Rarotonga:

(b) Every reference to an Order in Council shall be construed as including an order made by the Resident Commissioner of Rarotonga and publicly notified:

(c) Every reference to a Justice of the Peace shall be construed as including a Magistrate within the meaning of Part VI of the Cook Islands Act 1915:

(d) Every reference to the Commissioner of Police shall be construed as including the Chief Officer of Police at Rarotonga:

(e) Every reference to [a commissioned officer of Police] shall be construed as including any officer of Police.

(6) In the application of this Act to the Island of Niue—

(a) Every reference to the Governor-General or to the Attorney-General shall be construed as including the Resident Commissioner of Niue:

(b) Every reference to an Order in Council shall be construed as including an order made by the Resident Commissioner of Niue and publicly notified:

(c) Every reference to a Justice of the Peace shall be construed as including a Magistrate within the meaning of Part VI of the Cook Islands Act 1915:

(d) Every reference to the Commissioner of Police shall be construed as including the Chief Officer of Police at Niue:

(e) Every reference to [a commissioned officer of Police] shall be construed as including any officer of Police.

(7) In the application of this Act to the Tokelau Islands—

(a) Every reference to the Governor-General or to the Attorney-General shall be construed as including the Administrator of the Tokelau Islands:

(b) Every reference to an Order in Council shall be construed as including an order made by the Administrator of the Tokelau Islands.

(8) In the application of this Act to Western Samoa—

(a) Every reference to the Governor-General or to the Attorney-General shall be construed as including the High Commissioner of Western Samoa:

(b) Every reference to an Order in Council shall be construed as including an order made by the High Commissioner of Western Samoa and published in the *Western Samoa Gazette:*

(c) Every reference to a Justice of the Peace shall be construed as including a Judge or Commissioner of the High Court of Western Samoa:

(d) Every reference to the Commissioner of Police shall be construed as including the Superintendent of Police or other principal officer of police in Western Samoa.

In subss. (5) (e) and (6) (e) the reference to a commissioned officer of Police was substituted in each case for a reference to an Inspector of Police by s. 5 (2) of the Police Force Act 1947 (as substituted by s. 2 (1) of the Police Force Amendment Act 1956).

This Act is a reserved enactment—

In the Cook Islands other than Niue; see s. 39 (2) (a) of the Cook Islands Amendment Act 1957:

In Niue; see s. 70 (2) (a) of the Cook Islands Amendment Act 1957:

In Samoa; see s. 32 (2) (a) of the Samoa Amendment Act 1957.

18. Repeal—The Official Secrets Act 1911 of the Parliament of the United Kingdom shall on the passing of this Act cease to have effect in New Zealand.

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